REMEDY FOR CORPORATE HUMAN RIGHTS ABUSES IN TRANSITIONAL JUSTICE CONTEXTS

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ABSTRACT

Remedy for Corporate Human Rights Abuses in Transitional Justice Contexts
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Corporations and other business enterprises often operate in countries affected by conflict or repressive regimes and commit human rights violations and crimes under international law, either as the main perpetrator or as accomplices by aiding and abetting government forces. In transitional justice contexts, the trials, truth commissions, and reparations typically included within the set of remedy mechanisms have focused primarily on abuses by state authorities' or by non-state actors directly connected to the state, such as paramilitary groups or death squads. Innovative uses of transitional justice mechanisms across the world, however, have started to address, even if still only in a marginal way, corporate accountability for human rights abuses and crimes under international law and have attempted to provide redress for victims. This research analyses this development.

This research provides an original contribution to the field on business and human rights and the little-researched link with transitional justice by assessing how remedies for corporate human rights abuses and crimes under international law can be achieved in transitional justice contexts. To answer this question this research first analyses how different mechanisms (judicial processes at the international and domestic level, truth-seeking initiatives, and reparations programmes) have dealt, or failed to deal, with remedy for victims of corporate human rights abuses. It then examines their outcomes, the results those processes have achieved and the obstacles they have faced. The research takes a victim-oriented approach by analysing the tools, instruments and institutions available for victims (the bearers of rights) in transitional justice contexts (i.e. in countries emerging from conflict or authoritarian regimes) to remedy violations when those are committed by corporations.

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INTRODUCTION

Corporations and other business enterprises[1] often operate in countries affected by conflict or repressive regimes and their involvement in human rights violations and crimes under international law, as the main perpetrator or as accomplices by aiding and abetting government forces, has been well documented.[2] In the words of the former UN Special Representative on business and human rights: 'The most egregious business-related human rights abuses take place in conflict-affected areas and other situations of widespread violence'.[3] A report for the UN Office of the High Commissioner for Human Rights highlights a number of cases where business enterprises were complicit in gross human rights abuses, the majority of which committed in conflict-affected areas.[4]

In transitional justice contexts, the trials, truth commissions, and reparations typically included within the set of remedy mechanisms have focused primarily on abuses by state authorities' or by non-state actors directly connected to the state, such as paramilitary groups or death squads.[5] Innovative uses of transitional justice mechanisms across the world, however, have started to address, even if still only in a marginal way, corporate accountability for human rights abuses and crimes under international law and have

[1] For the purposes of this research, business activities include all activities of business entities, whether they operate transnationally or whether their activities are purely domestic, whether fully privately owned or State-owned, regardless of size, sector, location, ownership and structure. Transnational corporations and other business enterprises' is the way the UN refers to this issue, see UN Special Representative to the Secretary-General on human rights and translational corporations and other business enterprises. For short, often this research uses the term 'business enterprises' or 'business' or 'corporations'.

[2] eg, International Committee of the Red Cross (ICRC), *Business and International Humanitarian Law: An Introduction in the Rights and Obligations of Business Enterprises under International Humanitarian Law* (ICRC 2006); P Collier, A Hoeffler and D Rohner, 'Beyond Greed and Grievance: Feasibility and Civil War' (2009) 61 Oxford Economic Papers 1; Stichting Onderzoek Multinationale Ondernemingen (SOMO), *Multinationals and Conflict: International Principles and Guidelines for Corporate Responsibility in Conflict-Affected Areas* (SOMO 2014); JP Bohoslavsky and M Rulli, "Corporate Complicity and Finance as a 'Killing Agent' The Relevance of the Chilean Case" (2010) 8 JICJ 829; S Tripathi, 'Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards' (2010) 50 Politorbis 131; J Zerk, 'Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies' (2013), report prepared for the Office of the UN High Commissioner for Human Rights.

[3] 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, 'Business and human rights in conflict-affected regions: challenges and options towards State responses' (2011, A/HRC/17/32).

[4] Zerk (n 2) 17-23.

[5] UN Office of the High Commissioner of Human Rights (OHCHR), Analytical Study on Human Rights and Transitional Justice, A/HRC/ 12/18, 2009; P de Greiff, 'Theorizing Transitional Justice' in M Williams, R Nagy, and J Elster (eds.), *Transitional Justice* (New York University Press 2012); P Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge 2001); G Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000); N Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (US Institute of Peace Press 1995).

attempted to provide redress for victims.[6] This research analyses this development. It seeks to provide an original contribution to the field of business and human rights by assessing how remedies for corporate human rights abuses and crimes under international law can be achieved in transitional justice contexts. As backdrop to addressing this question, this introduction first assesses the scholarship and practical developments in the fields of business and human rights and transitional justice. It then elaborates on the research question and the nature of the original contribution to the field; it ends by presenting the structure and methodology of the work.

Early debates on business and human rights focused on the applicability of obligations to business enterprises under international human rights law. Starting in the late 1990s, international law scholars and practitioners argued for the expansion of international human rights law obligations to corporations. In 2000, Saman Zia-Zarifi, then Secretary-General of the International Commission of Jurists, and Menno Kamminga, argued that multinational corporations could be held liable under international law.[7] In the realm of core human rights norms, they asserted that multinational corporations 'are bound by those few rules applicable to all international actors'.[8] Andrew Clapham was among the first to argue that corporations have the capacity to acquire rights and obligations under international law.[9] This early exchange generated a typology that envisaged a division between binding and voluntary approaches in relation to the regulation of corporations when they impact human rights.[10] Whereas proponents of the binding approach, such as

[6] A Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 JICJ 899; E Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6 Northwestern JIHR 222; S Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 American Crim LR (2009) 1481; D Stoitchkova, 'Towards Corporate Liability in International Criminal Law' (2010) 38 Intersentia; A Batesmith, 'Corporate criminal responsibility for war crimes and other violations of international humanitarian law: the impact of the business and human rights movement', in C Harvey, J Summers, and N White (eds.), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge: Cambridge University Press 2014), 285; LA Payne and G Pereira, 'Corporate Complicity in Dictatorships' (Saïd Business School and University of Oxford).

[7] MT Kamminga and S Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (Kluwer Law International 2000).

[8] Ibid, 8.

[9] A Clapham, *Human Rights Obligations of Non-state Actors* (OUP 2006), 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6(5) JIJC, 899.

[10] eg, Kamminga and Zia-Zarifi (n 7); Clapham, *Human Rights Obligations of Non-state Actors* (n 9); S Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19 Connecticut JIL 1; N Jägers, (2002) *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia 2002); R McCorquodale, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 Modern Law Review 559; M Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International 1999); DM Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 Melb JIL 1; JM Woods, 'A Human Rights Framework for Corporate Accountability' (2010) 17 ILSA J Intl Comp L 321; L van den Herik and J Letnar

David Bilchitz and Surya Deva argue for the imposition of binding human rights obligations on corporations so they can be directly accountable for human rights at both domestic and international levels,[11] advocates of the voluntary approach maintain that the protection of human rights remains exclusively the responsibility of states, and that business can only assist in their advancement through voluntary means.[12] This academic debate followed the attempts to create a framework of human rights obligations and responsibilities for business enterprises, which, has discussed below, has proved challenging.

International law regulates human rights violations by corporations indirectly, through states.[13] International human rights bodies have affirmed the duty of states to regulate non-state actors, including corporations, in order to ensure that they do not interfere with

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Černič, 'Regulating Corporations under International Law From Human Rights to International Criminal Law and Back Again' (2010) 8 JICJ 725; JP Bohoslavsky and V Opgenhaffen, 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship' (2010) 23 Harvard HRLJ 157; JW Pitts, 'Corporate Social Responsibility: Current Status and Future Evolution' (2009)6 Rutgers JLPP 348; JH Dunning (ed), *Making Globalization Good: The Moral Challenges of Global Capitalism* (OUP 2003); LC Backer, 'The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality' (2006) 41 TULSA LJ 541; DG Arnold, 'Corporations and Human Rights Obligations' (2016) 1(2) BHRJ 255; J Letnar Černič and T van Ho (eds.), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Wolf Legal Publisher 2015) RM Bratspies, "Organs of Society": A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities" (2005) 13 Michigan State JIL 9.

[11] S Deva and D Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge University Press 2013); S Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and Language Employed by the Guiding Principles' in S Deva and D Bilchitz (eds.), ibid., 78-104, Deva, 'Human Rights Violations by Multinational Corporations and International Law' (n. 10). See also, C Lopez, "The 'Ruggie Process': from Legal Obligations to Corporate Social Responsibility, in S Deva and D Bilchitz (eds)., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge University Press 2013); Letnar Černič and van Ho (n 10); J Letnar Černič, *Human Rights Law and Business* (Europa Law Publishing 2010) and 'Corporate Human Rights Obligations at the International Level' (2008) 16 Willamette J Intl L 130; Jägers, *Corporate Human Rights Obligations* (n 10); SR Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale LJ; PT Muchilinski, *Multinational Enterprises and the Law* (OUP 2007); Clapham, *Human Rights Obligations of Non-state Actors* (n 7); G Chandler, "The Curse of 'Corporate Social Responsibility" (2003) 2 New Academy Review 1; D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' 44 (2004) Va J Intl L 931; CM Vasquez, 'Direct vs. Indirect Obligations of Corporations under International Law' 43 (2005) Columbia J Transnatl L 927; International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (ICHRP 2002).

[12] eg, JG Ruggie, 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization' in C Rodriguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press 2013); R Mayne, 'Regulating TNCs: The Role of Voluntary and Governmental Approaches' in S Picciotto and R Mayne (eds.), *Regulating International Business: Beyond Liberalization* (Mcmillan Press 1999); F Williams, 'Company Norms "Must be on UN Rights Agenda"' (8 April 2004) Financial Times, 9; DJ Karp, *Responsibility for Human Rights, Transnational Corporations in Imperfect States* (Cambridge University Press 2014); JE Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9(1) Santa Clara JIL 1.

[13] Deva, 'Human Rights Violations By Multinational Corporations And International Law' (n 10) 48; C Baez and others, 'Multinational Enterprises and Human Rights' (1999) 8 U. Miami Intl Comp L Rev 183, 220; D Bilchitz, 'A Chasm Between "Is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and Guiding Principles', in Deva and Bilchitz (n 11).

human rights.[14] For example, the Committee on Economic, Social and Cultural Rights has clarified that protecting rights means that states parties

> effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws, regulations, as well as monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations.[15]

The regional human rights systems have also affirmed this duty, and established similar correlative state requirements to regulate and adjudicate corporate actions.[16] Some UN Special Rapporteurs have interpreted their mandate so as to make recommendations to private actors as well.[17] In 2001, the UN High Commissioner for Human Rights stressed:

> Even though states retain the primary responsibility for ensuring the protection of human rights under the human rights treaties, there is a new awareness that such responsibility entails ensuring that companies operating from or within their jurisdiction must not undermine existing human rights obligations or the international rule of law.[18]

The debate did not stagnate over the technical issue of international legal personality. Businesses are participants in international life, able to be recipients of international legal

[14] eg, UN Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant on Civil and Political Rights (2004) CCPR/C/21/Rev.1/Add.13, which states 'The positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights.', para 8; Committee on Economic, Social and Cultural Rights (ESCR), General Comment No. 12: The Right to Adequate Food (1999) E/C.12/1999/5, para 20, General Comment No. 13: The Right to Education (1999) E/C.12/199/10, General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) E/C.12/2000/4, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (2017) E/C.12/GC/2, and Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights (2011) E/C.12/2011/1, para. 1; Committee on the Rights of the Child, General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights (2013) CRC/C/GC/16, para 53.

[15] Committee ESCR, Statement on the obligations of States Parties regarding the corporate sector (n. 14), paras 5, 7.

[16] eg, European Court of Human Rights, *Autronic AG v Switzerland* (1990) ser A 178, para. 47; Inter-American Court on Human Rights, *Velásquez-Rodríguez v. Honduras* (1988) ser. C No. 4, 172.

[17] eg, UN Human Rights Council, Report of the Special Rapporteur on the right to food Olivier de Schutter, Agribusiness and the Right to Food (22 December 2009) A/HRC/13/33; Special Rapporteur on the Right to Health Paul Hunt, Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines (2008).

[18] D Weissbrodt and PL Parker, Report of the Seminar to Discuss UN Human Rights Guidelines for Companies (29-31 March 2001) E/CN.4/Sub.2/2001/WG.2/WP.1/Add.3, paras 11-12.

norms, without the need to be classed as subjects with full international legal personality.[19] The Preamble of the *Universal Declaration of Human Rights* already embodied this spirit stating that 'every individual and every organ of society…shall strive…to promote respect for these rights and freedoms'.[20] As Louis Henkin emphasized, '[E]very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all'.[21] In some specific areas treaties define international legal obligations that specifically apply to corporations. Earliest among these was the *Apartheid Convention*, which established the international crime of apartheid and declared it a crime when committed by 'organizations, institutions and individuals.'[22] The UN *Convention Against Corruption* is an example of an international treaty that binds corporations with respect to their transnational conduct and the harms they cause.[23] While the claim that corporations have direct human rights obligations remains contentious and there are not yet international treaties that impose direct human rights obligations on corporations, international law in this field is developing.

UN efforts to directly regulate multinational corporations go back to the *Code of Conduct* negotiations that started in the mid-1970s and were abandoned a decade later.[24] The next attempt came in 2003 when experts the UN Sub-Commission on the Promotion and Protection of Human Rights drafted a treaty-like document called the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with*

[19] O Martin-Ortega, 'Business and Human Rights in Conflict' (2008) Carnegie Council for Ethics in Intl Affairs 279.
[20] Universal Declaration on Human Rights (UDHR) (10 December 1948) GA Res 217A (III) A/810, Preamble
[21] L Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' (1999) 25 Brook JIL 17, 25.
[22] International Convention on the Suppression and Punishment of the Crime of Apartheid (entered into force 18 July 1976) A/2645, art. 1(2) The Apartheid Convention was accompanied by a proposal-never implemented-for an international court to prosecute criminal violations of the treaty. According to the proposal, persons, legal entities, groups and organizations would all have been subject to the jurisdiction of the court, Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes, reproduced in MC Bassiouni, *The Statute of The International Criminal Court: A Documentary History* (Transnational Publisher1998). The UN Convention Against Transnational Organized Crime, opened for signature in 2000, defined the international crimes of participation in an organized criminal group, money laundering, corruption, and obstruction of justice, all of which applied to corporations as well as natural persons.
[23] UN Convention Against Corruption (entered into force 14 December 2005) 2340 UNTS 41. For commentary see, A Ramasastry, 'Closing The Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement', in Deva and Bilchitz (n 11), 162-190.
[24] UN Economic and Social Commission, Development and International Economic Cooperation: Transnational Corporations (1990) E/1990/94. See, B Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley JIL 45, 69; SD Murphy, 'Taking Multinational Codes of Conduct to the Next Level' (2005) 43 Colum J Transnatl L 403.

Regard to Human Rights (the Norms).[25] Intended to become binding, the Norms attributed to companies the 'obligation to promote, secure the fulfilment of, respect, ensure respect of and protect' human rights.[26] This approach faced strong opposition from businesses and was criticised by member states, especially Western countries, which opposed holding corporations directly accountable for human rights violations.[27] When the Norms were submitted to the UN Human Rights Commission in 2004, they were rejected.

In 2005, the UN Secretary-General appointed John Ruggie as the 'Special Representative on the issue of human rights and transnational corporations and other business enterprises' with a mandate to clarify the existing standards and elaborate on the role of states in regulating businesses.[28] Ruggie was reluctant towards the idea that companies could have direct obligations under international human rights law and criticized the Norms.[29] He observed:

> If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so.[30]

Ruggie did, however, identified 'governance gaps' - highlighting that while companies' operations and their economic and political influence reach across borders, international

[25] Sub-commission on Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 [hereinafter Draft Norms].
[26] Draft Norms, Preamble.
[27] JG Ruggie, 'Global governance and "new governance theory": Lessons from business and human rights' (2014), 20 Global Governance 5, 6; LC Backer, 'Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law' (2006) 37 Columbia HRLR 287, 'Rights and Accountability in Development ("RAID") v Das Air and Global Witness v Afrimex: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations' (2009) 10 Melbourne JIL 258; 15; K Lucke, 'States' and Private Actors' Obligations Under International Human Rights Law and the Draft UN Norms', in T Cottier, J Pauwelyn and E Burgi (eds.), *Human Rights and International Trade* (OUP 2005), 148, 159-160; D Kinley and R Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) HRLR 1; Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability* (AI 2004).
[28] UN press release, 'Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises' (28 July 2005).
[29] Interim Report of the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises John Ruggie, submitted to the Economic and Social Council (2006) E/CN.4/2006/97 [hereinafter Ruggie Interim Report], para 59, 69. Ruggie, 'Global governance and "new governance theory"' (n. 27), 7, 13; JG Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) AJIL 101, 125; Backer, 'Multinational Corporations' (n 27), 169-170.
[30] Ruggie Interim Report (n. 29), para 60.

human rights law did not seem able to address them.[31] Ruggie acknowledged that his mandate went beyond the legal realm, and included a 'full range of governmental responsibilities and policy options in relation to business and human rights'.[32] He labelled this approach one of 'principled pragmatism'.[33] By 2008, Ruggie submitted a *Framework for Business and Human Rights* to the UN on the 'different but complementary' responsibilities of states and corporations.[34] The Framework is based upon the 'protect-respect-remedy' three principles, or 'pillars': the duty of the state to protect their citizens against human rights abuses, including those perpetrated by third parties, such as corporations; the responsibility of businesses to respect human rights; and the obligation to provide a more effective remedy for human rights abuses. [35]

In 2011, the Human Rights Council unanimously endorsed the *UN Guiding Principles on business and human rights* (the Guiding Principles), which explain how states and corporate entities should implement the Framework.[36] The Guiding Principles provided 'for the first time a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity'.[37] The principles however remain of a persuasive rather than binding nature. Companies are not bound by the principles, which have no provisions for implementation, monitoring or proper enforcement mechanisms. Transitional justice is not mentioned, neither are the specific issues related to post-conflict and transitional contexts, and little research has been done in relation to whether the

[31] Report of the Special Representative to the Secretary General on the issue of transnational corporations and other business enterprises John Ruggie, 'Protect, Respect and Remedy: framework for Business and Human Rights' (2008) A/HRC/8/5 [hereinafter 'Protect, Respect and Remedy' framework]. B Fasterling and G Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights' (2013) 116 J Business Ethics, 799.

[32] Ruggie Interim Report (n. 29); Ruggie, 'Business and human rights: The evolving agenda' (n. 29). For a discussion see LC Backer, 'From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's 'Protect, Respect and Remedy' and the Construction of Inter-systemic Global Governance' (2011) Pacific McGeorge Global Business and Development LJ, and 'On the Evolution of the United Nations' 'Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context' (2011) 9 Santa Clara J Intl L 37, 46-48; Fasterling and Demuijnck (n. 30), 800. For opposite view, see D Weissbrodt, 'International Standard-Setting on the Human Rights Responsibilities of Businesses' (2008) 26 Berkeley J Intl. L 373 (2008).

[33] Ruggie Interim Report (n. 28), para 70.

[34] 'Protect, Respect and Remedy' framework (n. 31).

[35] Ibid., paras. 54, 63.

[36] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, annexed to Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Business Enterprises, John Ruggie, A/HRC/17/31 (21 March 2011) [hereinafter Guiding Principles]. UN Doc. A/HRC/17/L.17/Rev.1. The UN Human Rights Council endorsed the Guiding Principles with Resolution A/HRC/RES/17/4 (6 July 2011).

[37] UN Human Rights Council Resolution A/HRC/RES/17/4 (n. 35). After the adoption of the UN Guiding Principles, the UN Human Rights Council appointed a five-member Working Group.

Guiding Principles could be relevant in transitional justice situations.[38] The Guiding Principles briefly mention the issue of business activities in conflict-affected areas giving some recommendations to states to support business operating in such contexts:

> 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.[39]

With the adoption of the Guiding Principles a wealth of literature has been generated relating to whether they adequately address the complexities of international law in this area.[40] A significant amount of debate has been dedicated to either defending Ruggie for his pragmatic approach,[41] or criticizing him and the Guiding Principles, for not going far enough.[42] In particular, the principles have been criticised for providing limited provisions related to the role, responsibilities and requirements for companies in conflict, post-conflict and transitional contexts.[43] Some commentators have been critical of the Guiding Principles' remedy 'pillar' due to its strong emphasis on non-judicial and company-based grievance mechanisms - as opposed to judicial mechanisms and impartial administration of

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[38] G Paul and J Schönsteiner, 'Transitional Justice and the UN Guiding Principles on Business and Human Rights' in S Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013), 77, 92.

[39] Guiding Principles (n. 36), principle 7.

[40] Deva and Bilchitz (n 11); D Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 12 IJHR 199; JM Amerson, '"The End of the Beginning?': A Comprehensive Look at the Business and Human Rights Agenda from a Bystander Perspective' (2012) 17 Fordham J Corporate Finance L 871.

[41] SA Aaronson and I Higham, '"Re-righting Business': John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms' (2013) 35 HRQ 333. For Ruggie's own defence, see eg, JG Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Co. 2013), 'Business and human rights: The evolving agenda' (n. 29).

[42] S Deva, 'Protect, Respect and Remedy? A Critique of the SRSG's Framework for Business and Human Rights' in K Buhmann, L Roseberry and M Morsing (eds.) *Corporate Social and Human Rights Responsibilities. Global Legal and Management Perspectives* (Palgrave 2011), 108, 121; RC Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48 Texas Intl L J 33; N Jägers, 'UN Guiding Principles on Business And Human Rights: Making Headway Towards Real Corporate Accountability?' (2011) 29 Netherlands QHR 159, 160-163; D Weissbrodt, 'U.N. Perspectives on "Business and Humanitarian and Human Rights Obligations" (2006) 100 American Society Intl L Proceedings 135, 138-139; Paul and Schönsteiner (n. 38); DG Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights' (2010) 20(3) Business Ethics Quarterly, 371; W Cragg, 'Ethics, Enlightened Self-interest, and the Corporate Responsibility to Respect Human Rights: A critical Look at the Justificatory Foundations of the UN Framework' (2012) 22(1) Business Ethics Quarterly, 9; P Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22(1) Business Ethics Quarterly, 145; JD Bishop, 'The Limits of Corporate Human Rights Obligations and the Rights of For-profit Corporations' (2012) 22(1) Business Ethics Quarterly, 119; Fasterling and Demuijnck (n. 31), 799-800; D Leader, 'Business and Human Rights: Time to Hold Companies to Account' (2008) 8 Intl Criminal LR 447.

[43] Paul and Schönsteiner (n. 39), 75-84; S Michalowski, 'Due Diligence and Complicity - a Relationship in Need of Clarification' in Deva and Bilchitz (n 11); M Baleza, 'Corporate Complicity in Human Rights Violations. When is it Time to Leave a Country?' (2011) 8 Información Filosófica, 55, 65.

justice by independent third parties. According to Geneviève Paul and Judith Schönsteiner, for example, the third pillar's over-emphasis on company-based grievance mechanisms pose particular challenges in contexts of transitional justice as it overlooks the complexity of reparations issues, which often take place in large-scale situations and are manageable only on a case-by-case basis.[44] Within the critical discourse on the Guiding Principles part of the scholarship pushed for the creation of a binding treaty on business and human rights.[45]

On 26 June 2014, the UN Human Rights Council adopted a resolution establishing an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[46] An intergovernmental working group was established to draft the treaty and from 6 to 10 July 2015 it held its first session in Geneva, officially launching the negotiations at the UN towards a binding treaty on business and human rights.[47] Supporters of and opponents to such treaty were involved in heated debates before, during and after the adoption of the resolution and during the first two sessions of the working group.[48] Opponents included Ruggie, who radically concluded that the treaty negotiations 'would represent another dead end, delivering nothing to individuals and communities adversely affected by corporate conduct'.[49] Many scholars, hundreds of civil society organizations and a group of states, however, support this initiative due to their concerns of a lack of balance of rights and obligations of corporations 'within the current framework.'[50] The working group is due to present a first draft of the treaty during its third session on 23-27 October 2017.

Part of the debate on corporate legal accountability focuses on assessing the definition and nature of 'complicity' under international law to determine when a corporation could be

[44] Paul and Schönsteiner (n. 39), 74, 85-91.
[45] Martin-Ortega (n. 19), 282-83; DM Chirwa, 'The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law' (2006) South African J Human Rights 76.
[46] UN Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other Business Enterprises with respect to human rights, 26 June 2014, Res 26/1.
[47] First session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 6 to 10 July 2015, Geneva.
[48] N Bernaz and I Pietropaoli, 'The role of NGOs in the business and human rights treaty negotiations' (2017) Oxford J Human Rights Practice 1.
[49] JG Ruggie, 'A UN Business and Human Rights Treaty?' (28 January 2014), 'International Legalization in Business and Human Rights (11 June 2014).
[50] Bernaz and Pietropaoli (n. 48); International Commission of Jurists, 'Need and Options for a New International Instrument in the Field of Business and Human Rights' (June 2014), 2-8.

held responsible for the actions of a state.[51] Corporate complicity is not a clearly defined notion.[52] In a 2007 report, Ruggie defined corporate complicity as 'an umbrella term for a range of ways in which companies may be liable for their participation in criminal or civil wrong'.[53] The 2008 'Protect, Respect and Remedy' framework elaborates that complicity 'refers to indirect involvement by companies in human rights abuses – where the actual harm is committed by another party, including governments and non-State actors'.[54] An expert panel of the International Commission of Jurists identified three elements that can indicate corporate complicity: causation or contribution; knowledge and foreseeability; and proximity.[55]

Accusations of direct commission of international crimes or human rights violations against companies as principal perpetrators are rare.[56] Most often corporations are accused of complicity through their assistance in the commission of violations by the principal perpetrator – for example local police or the armed forces.[57] Complicity can take different forms. Corporations can facilitate the commission of violations by providing logistical support and by passing on certain information.[58] *Talisman Energy*, for example, was charged with aiding and abetting human rights abuses and international crimes in Sudan for providing logistical support to the military.[59] Another form of direct involvement is providing a regime or armed faction with products and services that are necessary for the execution or the organization of the crimes. The current investigations into allegations of complicity in war crimes against French companies *Amesys* and *Qosmos* over the provision

[51] S Michalowski, 'No Complicity Liability for Funding Gross Human Rights Violations' (2012) 30 Berkeley J Intl L 451; CI Keitner, 'Conceptualizing Complicity in Alien Tort Cases' (2008) 60 Hastings LJ 61; LJ Dhooge, 'A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations' (2007) 13 U.C. Davis J Intl L & Policy 119.
[52] S Michalowski, 'Due diligence and Complicity: A Relationship in Need of Clarification' in Deva and Bilchitz (n 11), 218, 220.
[53] Report of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises John Ruggie to the UN Human Rights Council, 'Business and human rights: Mapping international standards of responsibility and accountability of corporate acts' (February 2007), A/HRC/4/035 [hereinafter Ruggie 2007 report], para 31.
[54] 'Protect, Respect and Remedy' framework (n. 31), para 73.
[55] Report of the International Commission of Jurists Expert Panel on Corporate Complicity and International Crimes, *Corporate Complicty and Legal Accountabilty* (International Commission of Jurists 2008) Vol 1-25.
[56] An example is the lawsuit against Blackwater charged with war crimes committed against civilians in Iraq (eg, case filed on 10 June 2009 in the US District Court for the Eastern District of Virginia: *Estate of Husain Salih Rabea and Ali Kareem Fakhri v. Erik Prince, et al.*, civil action no. 1:09 cv 645).
[57] Fafo, *Business and International Crimes. Assessing the Liability of Business Entities for Grave Violations of International Law* (Fafo 2005), 29; International Commission of Jurists (n 55), Vol 1, 1–9; JP Bohoslavsky and MD Torelly, 'Financial Complicity: The Brazilian Dictatorship Under the "Macroscope" in DN Sharp (ed.), *Justice and Economic Violence in Transition* (Springer Science Business Media 2014), 233-259; C Sandoval, L Filippini and R Vidal, 'Linking Transitional Justice and Corporate Accountability' in S Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013).
[58] International Commission of Jurists (n 55), 19–20.
[59] *Presbyterian Church of Sudan v. Talisman Energy Inc* (582 5F.3 244, 259). See also Chapter III.2.

of surveillance systems to Gaddafi's Libya and Assad's Syria respectively are examples of this type of complicity.[60] A more indirect form of involvement occurs when a corporation benefits from the commission of abuses and crimes, without being directly involved in the execution stage of violations.[61] The violent repression of protests against *Chiquita*'s activities by security forces in Colombia is an example.[62] An even more detached form of involvement is that of 'silent' approval: continuing to do business with dictatorial regimes and thus contributing to the political legitimization and economic viability of such regimes. The South-African Truth and Reconciliation Commission (TRC), for instance, concluded that the Apartheid regime would not have survived without the business support of certain companies, such as *IBM* and *Ford*.[63]

The global civil society movement calling for greater corporate accountability and redress for victims could be arguably traced to the aftermath of the Bhopal disaster, a gas leak incident that occurred on the night of 2-3 December 1984 at the *Union Carbide* pesticide plant in Bhopal, India. It resulted in the death of at least 4,000 people, and the permanent injuries for thousands more.[64] But its causes and responsibilities were never fully established. Roughly in parallel with the development of this global movement and of the business and human rights field at the UN level, the field of transitional justice too expanded and gained impetus from political transitions taking place against repressive regimes around the world.

Transitional justice is not uniformly defined. The UN Secretary-General describes transitional justice as 'the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[65] The International Center for Transitional Justice, an NGO, defines it as a response to systematic or widespread violations of human rights seeking recognition for victims and the promotion of peace, reconciliation and democracy.[66] The classic scholarly definition of transitional justice

[60] See Chapter III.2.
[61] A Clapham and S Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses', paper presented at the University of California' conference on Holding Multinational Corporations Responsible under International Law (23-24 February 2001); W Huisman and E van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8 J. Intl. Criminal Justice 803, 817.
[62] See Chapter III.2.
[63] South Africa Truth and Reconciliation Commission, Final Report (1998), Vol. 4, Chap. 2. See also Chapter IV.1.
[64] DR Varma, 'The Bhopal Disaster of 1984' (2005) *Bulletin of Science, Technology and Society*.
[65] Guidance Note of the Secretary General, United Nations approach to transitional justice (March 2010).
[66] International Center for Transitional Justice (ICTJ), What is transitional justice? <https://www.ictj.org/about/transitional-justice> (accessed 23 August 2017).

proposed by Ruti Teitel is 'the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes'.[67] Naomi Roht-Arriaza provides another common definition: the 'set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with the past violations of human rights and humanitarian law'.[68]

Since the 1980s, when the phrase 'transitional justice' was first used, the field has been extensively researched, with many academic outputs, while also encompassing significant change and evolution through practice.[69] This evolution of transitional justice can be divided into three phases. An initial phase beginning in 1945 with the post World War II trials of Nazi war criminals at the International Military Tribunal of Nuremberg, after which the justice discourse changed to take into account new issues on human rights, war crimes, and the possibility of justice through international interventions.[70] A second phase is discernible in the late 1980s, wherein transitional justice emerged as a field of scholarly inquiry in response to dramatic political changes occurring as the Soviet Union collapsed, Eastern Europe underwent shifts in political and economic arrangements, and Latin American democratic regimes replaced authoritarian ones.[71] The third contemporary phase

[67] RG Teitel, *Transitional Justice* (OUP 2000); see also 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights J 69.

[68] N Roht-Arriaza, 'The New Landscape of Transitional Justice' in N Roht-Arriaza and J Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge University Press 2006), 2. For other definitions see, D Grey, 'An Escuse-Centered Approach to Transitional Justice' (2006) 74(5) Fordham LR 3, 2621, and 'Devilry, Complicity and Greed: Transitional Justice and Odious Debt' (2007) 70 L Contemporary Problems 137; F Haldemann, 'Another Kind of Justice: Transitional Justice as Recognition' (2008) 41 Cornell Intl LJ 675.

[69] Y Farah, 'Toward a Multi-Directional Approach to Corporate Accountability', in Michalowski (ed.) (n 39); T Olsen, L Payne and A Reiter, *Transitional Justice in Balance* (US Institute for Peace Press 2010); P Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 HRQ 321; F Megret, 'Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice' (2010) 16 Buff Hum Rts L Rev 1; Z Miller, 'Effects of Invisibility' (2008) 2 Intl J Transitional Justice 266; UN Secretary General, Report of the Secretary General, 'The rule of law and transitional justice in conflict and post conflict societies' (August 2004) S/2004/616; C Lekha Sriram, 'Transitional Justice Comes of Age: Enduring Lessons and Challenges' (2005) 23(2) Berkeley J Intl L 506; AM Gross, 'The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel' (2004) 40(1) Stanford J Intl L 47; BA Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30(1) HRQ 95; J Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press 2004).

[70] Teitel, 'Transitional Justice Genealogy' (n 67); Roht-Arriaza and Mariezcurrena (eds.) (n 68), 202; R Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29(2) ThirdWorld Quarterly, 276; Elster (n 69); G Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000).

[71] P de Greiff, 'Repairing the Past: Compensation for Victims of Human Rights Violations' in P de Greiff (ed.), *The Handbook of Reparations* (OUP 2006), 1; E Andreevska, 'Transitional Justice And Democratic Change: Key Concepts' (2013) 20 Lex et Scientia Intl J 54, 55; Arthur (n 69), 324, 326. Searching in law and political science databases, the first official appearance of the term is in a Boston Herald's article about the 'Justice in Times of Transition', an international conference held in 1992 in Salzburg: MJ Palumbo, 'New Democracies Debate How to Punish Dictators of Past' (5 April 1992) Boston Herald, 16. In 1995, Neil Kritz,

marks the 'expansion and normalization of transitional justice', which moved 'from the exception to the norm'.[72]

Interest in and support for the inclusion of 'economic and social dimensions of transitional justice' has grown over the years. It started with a number of voices calling for transitional justice measures to engage economic, social, and cultural rights.[73] In 2006, during a speech at New York University, the then-UN High Commissioner for Human Rights, Louise Arbour argued for integrating economic, social, and cultural rights into the transitional justice framework, thereby making 'the gigantic leap that would allow justice, in its full sense, to make the contribution that it should to societies in transition'.[74] In 2010, the UN Secretary-General released a *Guidance Note on the United Nations Approach to Transitional Justice* calling on the UN to 'ensure transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights, including economic, social and cultural rights'.[75]

Later research showed that in an increasing number of conflicts, alongside atrocities perpetrated on civilians - the traditional subject of transitional justice - a pattern of war economies had emerged, particularly around the exploitation of natural and mineral resources.[76] Rama Mani argued that transitional justice 'will lose credibility in the

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the vice-president of the Transitional Justice project at the US Institute of Peace, provided a comprehensive analysis in the three volumes book *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (US Institute of Peace Press 1995).

[72] Teitel, 'Transitional Justice Genealogy' (n 67), 71-2, 89. See also, K McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34(4) J Law Society 412; Andreevska (n 70), 55; D Tutu, *No Future without Forgiveness* (First Image Books 1999); Arthur (n 69), 322–64; Elster (n 69); P Hayner, *Unspeakable Truths: Confronting State Terror and Atrocities* (Routledge 2000); M Mutua, 'What Is the Future of Transitional Justice?' (2015) 9 Intl J Transitional Justice, 1; Sharp (n 56), 165-201.

[73] The earliest such critique came from South African NGOs that regretted the decision of the South African TRC to focus on politically motivated killings, torture and detention and its failure to engage with the widespread socioeconomic aspects of apartheid: University of the Western Cape's Community Law Centre and others, 'Submission to the Truth and Reconciliation Commission Concerning the Relevance of Economic, Social and Cultural Rights to the Commission's Mandate (18 March 1997); R Duthie, 'Toward a Development-sensitive Approach to Transitional Justice' (2008) 2 Intl J Transitional Justice 292; P Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2010); LJ Laplante, 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development' (2007) 10 Yale Human Rights Development LJ 141; Miller (n 69), 270-72; I Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) 3 Intl J Transitional Justice 163; Roht-Arriaza and Mariezcurrena (n 68); E Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press 2005); A Boraine, 'Transitional Justice: A Holistic Interpretation' (2006) 60 J Intl Affairs 18; McEvoy (n 72); R Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 Intl J Transitional Justice 253, 257.

[74] L Arbour, 'Economic and Social Justice for Societies in Transition' (2007-2008) 40 Intl JL and Politics, 1.

[75] Guidance Note of the Secretary General (n 65).

[76] R Carranza, 'Plunder and Pain: Should Transitional Justice Engage With Corruption and Economic Crimes?' (2008) 2 Intl J Transitional Justice 310; J Cavallaro and S Albuja, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond' in K McEvoy and L McGregor (eds.),

predominantly impoverished and devastated societies where it operates' if it does not tackle social injustice, corruption, and resource exploitation.[77] Ruben Carranza, a director at the International Center for Transitional Justice, contended that an impunity gap results when transitional justice measures ignore accountability for large-scale corruption and economic crimes, pointing to the strategic role that such crimes play in maintaining systems of abuse, as well as use of the assets from such crimes to avoid accountability.[78] Sabine Michalowski and Lisa Hecht observe that practitioners often 'call for holding responsible those who deliberately contributed to perpetuating a state of mass poverty' and for recovering assets that were wrongly acquired.[79] Transitional justice practitioners had been initially reluctant to include economic crimes within its scope. This related to legitimate concerns about transitional justice mechanisms, which are often underfunded, facing too ambitious aspirations and extensive mandates. As such, expanding the mandate of truth commissions or tribunals to include economic crimes may raise unrealistic expectations and make the successful completion of mandates impossible. Contemporary truth commissions, however, established for example in Liberia and East Timor, have included economic, social and cultural rights in their investigation mandates.[80]

In parallel to the calls for integration of violations of economic, social and cultural rights, transitional justice practice and scholarship have started to address the role of companies. In 1998, the South Africa TRC found that business had a fundamental role to maintain the *status quo* of the apartheid society.[81] The Liberian TRC dedicated a chapter of its 2009 final report to the impact of economic activities in prolonging and intensifying the civil war, and urged the aggressive pursuit of proceedings against corporations found to be implicated in the violence.[82] In 2015, the government of Argentina passed a law establishing a new truth commission mandated to investigate economic complicities in the

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Transitional Justice from Below: Grassroots Activism and the Struggle for Change (Hart 2008), 121; Bohoslavsky and Opgenhaffen (n 9), 197-201; K Andrieu, 'Dealing with a 'New' Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?' (2012) 11(4) J Human Rights 537–557; I Robinson, 'Truth Commissions and Anti-Corruption: Towards a Complementary Framework?' (2015) 9(1) Intl J Transitional Justice, 33; N Roht-Arriaza 'Why Was the Economic Dimension Missing for so Long in Transitional Justice? An Exploratory Essay' in H Verbitsky and JP Bohoslavsky (eds.), *The Economic Accomplices to the Argentine Dictatorship* (Cambridge University Press 2015), 19.

[77] Mani (n 73), 235.

[78] Carranza (n 76), 314-29.

[79] L Hecht and S Michalowski, 'The Economic and Social Dimensions of Transitional Justice' (2012) ETJN Concept Paper, 2.

[80] eg, Liberia Truth and Reconciliation Commission, Final Report, Economics Crimes and the Conflict, Exploitation and Abuse (2009), Vol 3. See also Chapter IV.2.

[81] South Africa Truth and Reconciliation Commission (n 63). See also Chapter IV.2.

[82] Liberia Truth and Reconciliation Commission (n 80).

dictatorship.[83] Corporate accountability is part of a broader debate within transitional justice and international criminal law about how economic crimes should be addressed.[84] This research uses the term 'economic crime' referring to embezzlement, fraud, tax crimes, corruption, as well as the plunder of natural resources.[85] Economic crimes are deeply intertwined into the narrative of many modern conflicts, as both drivers and sustainers.[86] But transitional justice mechanisms have traditionally focused on acts of physical violence and other civil and political rights violations.[87]

While there are a large number of sources on the legal accountability on corporations for human rights abuses under national and international law, as well as on transitional justice in general, there is little literature that links the two areas. There is only one book, edited by Sabine Michalowski titled *Corporate Accountability in the Context of Transitional Justice*, that compiles different cases, but there is, to date, no monograph on the subject that sets out a clear hypothesis.[88] Scholarship in this area has mostly focused on the analysis of one specific country (mostly South Africa, and more recently Argentina and Colombia), one specific mechanism (in particular the Nuremberg trial against German industrialists, and the South Africa TRC), one type of rights violation (for example, the corporate exploitation of natural resources), or one specific issue (for example financial complicity).[89] For example, Juan Pablo Bohoslavsky, the UN independent expert on the effects of foreign debt, has extensively researched the issue of financial complicity in Latin American countries and, with Horacio Verbitsky, has published a book on economic complicity in Argentina.[90] Ruben Carranza has published a number of articles arguing that transitional justice should engage with the exploitation of natural resources, and other 'economic crimes'.[91] The role of corporations has been occasionally mentioned as one of

[83] Government of Argentina, Ley de Creación de la Comision Bicameral de la Verdad, la Memoria, la Justicia, la Reparación e el Fortalecimiento de las Instituciones de la Democracia (2015).
[84] See, D Sharp, 'Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice' (2012) 35 Fordham Intl LJ Journal 780.
[85] See, E Schmid, 'War Crimes Related to Violations of Economic, Social and Cultural Rights' (2011) 71(3) Heidelberg J Intl L 540; Muvingi (n 73), 180; R Duthie, 'Transitional Justice, Development, and Economic Violence' in Sharp (ed.) (n 57), 1; Carranza (n 76), 327-28; I Bantekas, 'Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies' (2006) 4(3) J Intl Criminal Justice 466-84.
[86] DN Sharp, 'Economic Violence in the Practice of African Truth Commissions and Beyond' in Sharp (n 57), 79.
[87] Miller (n 69), 275-76; Cavallaro and Albuja (n 76), 122.
[88] Michalowski (ed.) (n 39).
[89] eg, G Koska, 'Corporate Accountability in Times of Transition: The Role of Restorative Justice in the South African Truth and Reconciliation Commission' (2016) 4(1) Restorative Justice' 41.
[90] JP Bohoslavsky and H Verbitsky, *Cuentas Pendientes* (Siglo Ventiuno Editores 2015).
[91] Carranza (n 76).

the topics to consider in the context of transitional justice[92] or the issue of transitional justice mentioned in discussions on corporate complicity.[93] Some research has been done in relation to restorative justice and corporate accountability, with some authors proposing that a restorative justice approach to business can be effective in regulating and punishing corporate entities.[94] The scholar most active in articulating the links between corporate accountability and restorative justice is John Braithwaite. He has developed theories on 'reintegrative shaming' and on 'responsive regulation', which rely on the moral agency of a corporation in order to activate a response to shame and ultimately to change corporate behaviour.[95]

This research provides an original contribution to the field on business and human rights and the little-researched link with transitional justice by assessing how remedies for corporate human rights abuses and crimes under international law can be achieved in transitional justice contexts. To answer this question this research first analyses how different mechanisms (judicial processes at the international and domestic level, truth-seeking initiatives, and reparations programmes) have dealt, or failed to deal, with remedy for victims of corporate human rights abuses. It then examines their outcomes, the results those processes have achieved and the obstacles they have faced. The research takes a victim-oriented approach by analysing the tools, instruments and institutions available for victims (the bearers of rights) in transitional justice contexts (i.e. in countries emerging from conflict or authoritarian regimes) to remedy violations when those are committed by corporations.

Remedies for corporate human rights abuses include both corporate accountability and reparations for victims. Corporate accountability is a broad concept, not limited to corporate liability (the consequences of the breach of a legal obligation), but referring to responsibilities for the consequences of a conduct.[96] In the context of this research it

[92] EE Harwell and P Billon, 'Natural Connections: Linking Transitional Justice and Development Through a Focus on Natural Resources' (International Center of Transitional Justice 2009).
[93] DC Gray, 'Devilry, Complicity and Greed: Transitional Justice and Odious Debt' (2007) 70 L Contemporary Problems 137; Michalowski and Bohoslavsky, 'Ius Cogens, Transitional Justice and Other Trends in the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debt' (2009) 48 Colum J Transnatl L 59.
[94] D Roche, 'Dimensions of Restorative Justice' (2006) 62(2) J Social Issues 217, 227; J Goodstein and K Butterfield, 'Extending the Horizon of Business Ethics: Restorative Justice and the Aftermath of Unethical Behaviour' (2010), 20(3) Business Ethics Quarterly 453.
[95] J Braithwaite, *Crime, Shame, and Reintegration* (Cambridge University Press 1989), 126-27, *Restorative Justice and Responsive Regulation* (OUP 2002), 30-31; J Braithwaite and B Fisse, *Corporations, Crime, and Accountability* (Cambridge University Press 1993), 141-45.
[96] N Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 J Business Ethics 494.

includes measures to hold corporations and other business enterprises legally liable, or otherwise accountable, for violations of human rights they may have committed,[97] either directly on in complicity with the state.

Reparation is one of the processes through which rights violations may be remedied, and it is a key component of transitional justice.[98] The 2005 *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* (the Basic Principles) define reparations as including five forms: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition.[99] The right to reparations is primarily a right that can be claimed against the state under international human rights law, against the state and non-state actors under international humanitarian law, and against individual perpetrators under international criminal law.[100] While international law is silent in relation to corporations having such obligation, there are some non-binding principles stating that corporations have the 'responsibility' to provide redress to victims of human

[97] In this chapter the phrases 'corporate human rights abuses' and 'corporate human rights violations' are used interchangeably and are intended to mean the same thing: business negative impacts on human rights. In international law literature and practice the term 'human rights violations' is often restricted to the actions of states, while the actions of businesses are usually described as 'human rights abuses' or as 'having an adverse human rights impact'. This practice is based on the argument that international law does not impose direct human rights obligations on corporations and thus they cannot legally commit violations against human rights.

[98] de Greiff (ed.) (n 71); Hayner (n 72); Bass (n 70); M Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Atrocity* (Beacon Press 1998); Kritz (n 71); M Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers 1999); Miller (n 69), 268; Guidance Note of the Secretary General (n 65), 8,9; N Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in Sharp (ed.) (n 57), 109-38.

[99] 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, adopted by UN General Assembly, Resolution 60/147 of 16 December 2005 [hereinafter Basic Principles], principles 19-22.

[100] Most of the law applicable to state responsibility and reparations has become customary international law and codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (International Law Commission 2001 A/56/10). The leading opinion in this regard is set out in the judgment of the Permanent Court of International Justice in the Chorzow Factory case: 'It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form' (1927, P.C.I.J. ser. A no. 9, 21). International humanitarian law contemplates the obligation of parties to armed conflict to pay compensation for violations of provisions: Hague Convention respecting the Laws and Customs of War on Land (art. 3), Additional Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (art. 91). Individual criminal responsibility for crimes against humanity, war crimes, genocide and aggression is in the Rome Statute of the International Criminal Court (arts. 68 and 75). See also, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Theo van Boven, Special Rapporteur (E/CN.4/Sub.2/1993/8); M du Plessis, 'Reparations And International Law: How Are Reparations To Be Determined (Past Wrong or Current Effects), Against Whom, and What Form Should They Take?' (2003) 22 Windsor YB Access Just 61, C Sandoval and G Surfleet, 'Corporations and Redress in Transitional Justice Processes' in Michalowski (ed.) (n 38), 93-97; Boraine (n 73); de Greiff (n 71); NL Rosenblum, *Breaking the Cycles of Hatred: Memory, Law, and Repair* (ed.) (Princeton University Press 2002); R Falk, 'Reparations, International Law and Global Justice: A New Frontier' in de Greiff (ed.) (n 71), 451-77.

rights violations.[101] The Guiding Principles, for example, highlight the responsibility of corporations to address adverse human rights impacts, in addition to the state's obligation to provide redress to victims of corporate-related human rights abuses.[102] The issue of responsibility of non-state actors was also raised in the discussions and negotiations of the Basic Principles, with regard to groups that exercise effective control over a territory, but also with regard to business enterprises exercising economic power.[103] The Basic Principles provide for equal and effective access to justice, 'irrespective of who may ultimately be the bearer of responsibility for the violation'.[104] Theo Van Boven, whose work was central to the drafting of the Basic Principles, noted that these were meant to apply also 'to business enterprises exercising economic power'.[105] It was considered, from a victim-oriented perspective, that non-state actors are to be held responsible for their policies and practices, allowing victims to seek redress and reparations.[106] Under principle IX.15,

> In cases where a person, *a legal person*, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.[107]

Despite differences in definitions, transitional justice necessarily implies a particular set of measures to deal with legacies of violations that occurred during armed conflicts or under authoritarian regimes.[108] It deals with the legacy of past atrocities by applying four different branches of international law: international human rights law; international humanitarian law; international refugee law; and international criminal law.[109] These four

[101] The final version of the draft UN Norms included this paragraph: 'Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken'. Draft Norms (n 24), para 18. See also, D Weissbrodt and M Kruger, 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 AJIL 901.
[102] Basic Principles (n 98), principle 11.
[103] T van Boven, 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, 2010. See also Sandoval and Surfleet (n 100), 93, 99
[104] Basic Principles (n 98), principle 3(c).
[105] van Boven (n 102).
[106] Ibid, 1-3.
[107] Basic Principles (n 98), principle IX.15.
[108] P de Greiff, 'Theorizing Transitional Justice' in M Williams, R Nagy, and J Elster (eds.), *Transitional Justice* (New York University Press 2012); DN Sharp, 'Economic Violence in the Practice of African Truth Commissions and Beyond' (n 90), 165-201; Kritz (n 71); Andreevska (n 71), 55; C Sandoval, 'Linking Transitional Justice and Corporate Accountability' in Michalowski (ed.) (n 39), 11; Hayner (n 72).
[109] Guidance Note of the Secretary General (n 65); P de Greiff, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/HRC/21/46 (9 August 2012); van Boven (n 102).

sub-fields of international law have framed transitional justice. First, by emphasizing the state obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, and to punish those found guilty.[110] Second, by creating the legitimate expectation to uncover the truth about past abuses.[111] Third, by establishing, through state practice, the right to reparations for victims of gross violations of human rights and international humanitarian law.[112] Fourth, in reiterating the state obligation to prevent the recurrence of such violations in the future.[113] On the operational level, four processes, based on the above principles, constitute the core of transitional justice: i) justice processes, which aim to bring perpetrators of abuses to justice and to punish them for the crimes committed; ii) truth-seeking initiatives,

[110] Universal Declaration of Human Rights (UDHR), Art 8; International Covenant on Civil and Political Rights (ICCPR), Art 2, 6; Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (CAT), Art 4, 5, 7, 12; International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), Art 3, 6, 7, 11; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Art 6; Convention on the Rights of the Child (CRC), Art 39; American Convention on Human Rights, Art 25, 63; African Charter on Human and Peoples' Rights, Art 7; European Convention on Human Rights, Art 5, 13, 41. See also, UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 2005 E/CN.4/2005/102/Add.1 [hereinafter Principles to combat impunity], principles 1, 19. For violations of the ICCPR, the Human Rights Committee has stressed the need for judicial remedies in cases of serious violations of the Covenant: views of the Human Rights Committee under Art. 5, para. 4, of the Optional Protocol to the ICCPR (*Bithashwiwa and Mulumba v. Zaire*), UN CCPR, Com. No. 241/1987, 14, CCPR/C/37/D/241/1987 (1989). Regional human rights systems have further codified and interpreted those obligations. For example, Article 1.1 of the American Convention on Human Rights (as interpreted) by the Inter-American Court on Human Rights in the *Velásquez-Rodriguez v. Honduras* (ser. C) No. 1, 91 (1987) and in *Ituango Massacres v. Colombia*, (2006) Series C No. 148; the European Court of Human Rights in the procedural objections as interpreted, for example, in *Timurtas v. Turkey* ECHR 221 App. No. 23531/94 (2000), *Turkey, Aksoy v. Turkey*, 26 Eur. Ct. H.R. 2260 (1996), *Mentes v. Turkey*, 59 Eur. Ct. H.R. 2689 (1997), *Conka v. Belgium* (App. No. 51564/99) (2002). See also, N Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 Calif L Rev 451.

[111] The right of victims and their families to know the truth in relation to past human rights abuses as such is not explicitly recognised as a substantive right in the UDHR or other human rights treaties with the exception of the Convention on Enforced Disappearances (art 24) and in the Geneva Conventions (art 32). Other UN treaties imply the right to truth. See eg, International Covenant on Civil and Political Rights, article 2. See also Principles to combat impunity, Principles 2-5; Basic Principles, art. 22. The Inter-American Court of Human Rights has traced the contours of the truth as the first step and an essential component of an effective remedy, in the wake of enforced disappearances, starting with the seminal *Velásquez Rodriguez* case (n 110). See also, T Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2002) 23 Mich J Intl L 977, 995; Hayner (n 72), 24

[112] UDHR, Art 8; ICCPR, Art 2(3); CERD, Art 6; CAT, Art 6, 13, 14; ICPPED, Art 23; CRC Art 39; Articles on Responsibility of States for Internationally Wrongful Acts elaborated by the International Law Commission, A/RES/56/83, article 31 (1). See also, General comment No. 31 of the Human Rights Committee reaffirms the central importance of the right to reparation, and its integral relationship with the right to an effective remedy, paras. 15-16; Basic Principles, art. 24. See also, D Shelton, 'The United Nations Principles and Guidelines on Reparations: Context and Contents' in KS De Feyter and others (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2006), 11–33); P de Greiff, 'Truth Telling and the Rule of Law' in TA Borer (ed.), *Telling the Truths: Truth Telling and Peacebuilding in Post-Conflict Societies* (University of Notre Dame Press 2006).

[113] ICCPR, Art 2; CAT, Art 2; ICPPED, Art 23. See also, Principles to combat impunity, principle 35. See also, MB Ndulo and R Duthie, 'The Role of Judicial Reform in Transitional Justice and Development' in ICTJ Research Unit, *Transitional Justice and Development*; Duthie (n 89), 176; Hayner (n 72), 102-06; B Fernando, 'Institutional Reforms as an Integral Part of a Comprehensive Approach to Transitional Justice' (2014) 8 Intl J Transitional Justice, 187; DJ Scheffer, 'The Tool Box, Past and Present, of Justice and Reconciliation for Atrocities' (2001) 95(4) AJIL 970.

to investigate past violations and establish the facts; iii) reparation processes, to redress victims for the harm suffered; and iv) institutional reform processes, to transform the military, police, and judiciary to ensure that violations do not happen again.[114] Effective transitional justice programmes use comprehensive approaches that integrate the full range of these judicial and non-judicial processes or a combination of them.[115] Each mechanism can simultaneously achieve the aim of other processes: for example, litigation can also help providing reparations for victims and establishing facts related to past abuses, and truth-seeking initiatives can recommend reparations for victims and prosecution of corporations.

This research focuses on three main processes to achieve justice in times of transition: i) judicial mechanisms (prosecution initiatives and civil claims both at the international and national levels); ii) truth-seeking initiatives, such as TRCs; and iii) reparations programmes. Institutional reforms, the other mainstay of transitional justice processes, is not addressed specifically because it refers to the prevention of future abuses, while this research is restricted to focussing on accountability and reparations for past abuses. With this aim as a framework, this thesis is divided into six chapters, each assessing how different mechanisms have achieved, or failed to achieve, corporate accountability and reparations for victims in transitional justice contexts.

The first three chapters focus on judicial processes, at the international (Chapter I), regional (Chapter II) and domestic levels (Chapter III). Judicial processes are key mechanisms to achieving justice in times of transition, are an instrument for ensuring corporate legal accountability, and are, equally, a key aspect of the right to remedy for victims of corporate human rights abuses. The Guiding Principles state that 'effective judicial mechanisms are at the core of ensuring access to remedy'[116] and that 'States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing human rights-related claims against business'.[117] Chapters I, II, and III explore how different judicial remedies at the international, regional and national level have addressed, or failed to address, violations of human rights and crimes under

[114] UN Office of the High Commissioner of Human Rights (OHCHR), Analytical Study on Human Rights and Transitional Justice (2009) A/HRC/12/18; Pablo de Greiff, 'Theorizing Transitional Justice' (n 108); Hayner (n 72); Bass (n 70); Minow (n 97); Kritz (n 71); Osiel (n 97).
[115] UN Security Council Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004) S/2004/616, 8. See also, E Lutz, 'Transitional Justice: Lessons Learned and the Road Ahead' in Roht-Arriaza and Mariezcurrena (eds.) (n 68), 325-326; Teitel, *Transitional Justice* (n 67), 224.
[116] Guiding Principles (n 36), commentary to principle 26.
[117] Ibid., principle 26.

international criminal law committed by corporations during times of conflict or repression, and whether they have achieved reparations for victims. The aim of these chapters is to analyse the normative and practical challenges often resulting in corporate impunity and lack of remedy for victims, and to present options for future development.

Chapter I explores both the limitations and the potential of international criminal law in this area, through the assessment of historical and contemporary cases, from Nuremburg to the International Criminal Court. Chapter II aims to contribute to the research on transitional justice and corporate accountability by analysing mechanisms that are rarely associated with the two areas: the regional systems for human rights protection. While these are not transitional justice mechanisms *per se* and cannot directly adjudicate the responsibility of companies, this chapter aims to demonstrate how regional systems, and in particular the Inter-American and African systems, have, and could further, indirectly provide remedies for victims of corporate abuses and shape national reparation programmes in transitional justice contexts. The analysis in Chapter III turns to assessing the efforts to achieve corporate legal accountability and reparation at the domestic level, through criminal prosecutions, and civil litigation, which focuses of cases litigated under the United States' Alien Tort Statute alleging corporate abuses committed during times of conflict or repressive regimes.

After the analysis of judicial processes, the research moves to a different mechanism to achieve justice in times of transition: truth-seeking initiatives. The search for the truth about past human rights abuses is the cornerstone of almost every transitional or post-conflict process established across the world. Parallel to the evolution of the right to truth as remedy in international tribunals, TRCs, commissions of inquiry, or other truth-seeking bodies have become an increasingly common mechanism for societies seeking to move forward as they emerge from a period conflict or repression.[118] Chapter IV analyses how different truth-seeking initiatives (TRCs as well as other investigative bodies, such as UN-mandated fact-finding missions and expert panels) have addressed the responsibility of corporations for human rights violations or international crimes committed during times of conflict or repression, and have recommended reparations from business. This chapter focuses on the South African TRC, but also offers commentary on truth commissions established in other countries (Liberia, East Timor, Sierra Leone, Argentina, and Brazil). It examines the outcomes of these findings, and assesses whether or not they have achieved

[118] S Ratner, 'New Democracies, Old Atrocities: An Inquiry in International Law' (1999) 87 Geo LJ 707.

corporate accountability and reparations for victims. The aim of this chapter is to present the limitations of truth-seeking bodies in this area, but also to highlight the innovations they have put forward and how these could be expanded further.

After the analysis of reparations ordered or recommend by international and national courts and truth commissions, the final part of this research turns to the assessment of administrative reparation programmes – programmes established by national legislation. Chapter V looks at programmes dealing with a particular type of reparation, land restitution, which can include the restitution of land taken for economic reasons during an armed conflict or time of repression. The are a number of reasons for the focus on land restitution: land acquisition is often a driver of conflict; land confiscation, forced evictions and population displacement are common during conflict; land disputes are a key aspect that countries in transition need to address; land is in most cases the most important asset that victims seek back after a transition; corporations are often involved in land confiscation either directly or in complicity with the state; land rights abuses are some of the most widespread corporate human rights abuses; and innovative reparation programmes have tried to deal with victims' grievance in this area. This chapter focuses on efforts to return land that was seized for economic projects in transitional countries in three different continents (Colombia, Myanmar, and South Africa). It shows that, despite challenges, innovative reparation programmes involving the responsibilities of business have been implemented, presenting an interesting avenue for remedy.

This research shows that justice and remedy processes across a number of countries in transitional justice contexts have addressed corporate accountability to different extents and have attempted to provide reparations for victims. But it also shows that corporate accountability is very rarely achieved, that impunity is the norm, and that victims face major obstacles to obtain reparations for past abuses in transitional justice contexts. This research analyses the normative, practical, economic and political reasons for such failure, compare different transitional justice processes across different countries, and identifies practices within the transitional justice 'toolbox' that can more adequately achieve corporate accountability and redress for victims. It concludes with suggestions for the potential expansions of certain avenues.

I. NUREMBERG AND INTERNATIONAL CRIMINAL LAW

Introduction

Judicial processes are key mechanisms to achieving remedies for corporate human rights abuses in transitional justice contexts. This Chapter explores the options and limitations of judicial processes at the international level, while the next two chapters analyse the regional and the national level. Because currently there are no mechanisms available to hold corporations legally accountable for human rights violations at international level, this Chapter examines the avenues available through international criminal law. International criminal law deals with the responsibility of individuals (natural persons) for the most serious international crimes. International criminal law has a narrow area of application - genocide, crimes against humanity and war crimes. Human rights law instead spans a whole array of rights, civil and political rights, economic, social and cultural rights, as well as group rights. But while the theoretical obstacle for corporate human rights obligations is the shift from states to legal persons as subjects of law, in international criminal law a similar shift is not required – instead the shift is from individuals to corporations, which is less problematic from an international law perspective.[1]

Prosecution initiatives as part of transitional justice aim to ensure that those responsible for committing crimes committed in the context of conflict or repressive rule, are tried in accordance with international standards of fair trial and, where appropriate, punished. But states emerging from years of conflict or repressive rule may be unable or unwilling to conduct effective investigations and prosecutions. In such situations, international and hybrid criminal tribunals may exercise concurrent, or 'complementary', jurisdiction. These mechanisms have never used their jurisdiction over corporations for crimes under international law. This Chapter discusses the normative and political reasons. With the analysis of the post-World War II cases (explored in section I.1) to the possibility of holding corporate officers and managers criminally responsible before the International Criminal Court (I.2) and the *ad hoc* tribunals (I.3) and the debate of scholars and practitioners in this area, this Chapter assesses the limitations of international criminal law in holding corporations accountable for the

[1] A Clapham, Human Rights Obligations of Non-State Actors (OUP 2006), 3.

commission of crimes under international law. It also discusses area of potential future expansion of this avenue.

I.1 Nuremberg and Subsequent Trials

The debate over the responsibility of corporations under international criminal law has its roots in the Nuremberg trials conducted after World War II.[2] Evidence of the central role of business in the Nazi war effort revealed the extent of crimes committed by companies through the forcible transfer and enslavement of millions of people, the production of arms used to wage aggressive war and the supply of poisonous chemicals for the killing of civilians in concentration camps.[3] The cases against executives and employees of Germany companies, analysed in the next sections, remain the starting point for any discussion of corporate criminal responsibility in transitional justice contexts.

The International Military Tribunal

The *Charter of the International Military Tribunal* (IMT) established the principle of individual criminal accountability for the first time, for certain crimes under international law.[4] In departing from the notion of state responsibility under international law, where states were the only relevant subjects, responsibility was instead conceptualised along an individual dimension. This conception continues to shape the understanding of individual responsibility and has had a significant impact on the broader scope of transitional justice, including in relation to the prosecution of corporations.[5]

The IMT did not have jurisdiction over legal persons. The tribunal declared, 'Crimes against international law are committed by men, not by abstract entities, and only by punishing

[2] International Military Tribunal, Trials of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, Vols 1-43 [hereinafter Trial of the Major War Criminals].
[3] JA Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 Colom LR 1094, 1105.
[4] Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Charter of the International Military Tribunal], article 6 (granting the Tribunal authority to evaluate the 'individual responsibility' of 'persons' who acted as 'individuals or as members of organizations'). Organizations could be held to be 'criminal', subjecting certain members to prosecution for the crime of membership in a criminal organization, ibid., arts. 9, 10. See also, Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), at 188, A/64/Add.1 (11 December 1946).
[5] RG Teitel, 'Globalizing Transitional Justice: Contemporary Essays' (2014) Oxford Scholarship Online.

individuals who commit such crimes can the provisions of international law be enforced'.[6] The IMT's innovation, however, based on the American law of conspiracy, was in linking up individual and organizational responsibility.[7] A distinctive feature of the Charter of the IMT was the possibility for the Tribunal to declare, in connection with any act for which an individual was convicted, that groups or organizations of which the accused was a member were criminal organizations.[8] Under the Charter, the IMT had jurisdiction for 'the trial and punishment of the major war criminals…acting in the interests of the European Axis countries, whether as individuals or as members of organizations'.[9] As such, the Tribunal declared the Gestapo and 55 other Nazi organizations to be criminal in nature.[10] Yet, the Tribunal's recognition of the criminal responsibility of these organizations served to provide a legal basis for the prosecution of individuals, and should not be interpreted as recognition of responsibility of legal persons. Such bodies were not analogous to private corporations, as they represented the Nazi state.[11]

Among the 21 people prosecuted at Nuremberg, there were no industrialists who did not also hold an official position in the Nazi regime.[12] One prominent German industrialist, Gustav Krupp, was indicted, but the IMT declared him unfit for trial.[13] Several of those convicted at Nuremberg and subsequent trials were involved in private industry and banking, but also operated as state agents.[14] For example, Walther Funk was the president of the *Reichsbank* and also Minister of Economics and Plenipotentiary General for War Economy. The Tribunal found that Funk agreed with the SS that the *Reichsbank* was to receive personal belongings taken from the victims who had been exterminated in the concentration camps.[15] The aid given to the SS by the bank would render Funk an accessory in the crimes against concentration

[6] Trial of the Major War Criminals (n 2).
[7] RH Jackson, 'The Law Under Which Nazi Organizations Are Accused of Being Criminal' (1946) 19 Temporary L Quarterly 371.
[8] Charter of the International Military Tribunal (n 4), article 9.
[9] Ibid., article 6.
[10] Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression: Opinion and Judgment 91, 97,102 (United States Printing Office 1947).
[11] P Muchlinski, 'Human Rights and Multinationals: Is there a Problem?' (2001) 77(1) Intl Affairs 31, 39.
[12] N Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights' (2017) J Intl Criminal Justice.
[13] Ruling of the Tribunal on 15 November 1945 in the matter of the application of Counsel for Krupp Von Bohlen for postponement of the Proceedings against this defendant, Office of the United States Chief of Counsel for Prosecution of Axis Criminality, Vol. I (United States Printing Office 1946), ch. IV, 92.
[14] KJ Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (OUP 2011).
[15] Trial of the Major War Criminals (n 2), Vol. 1, 306.

camp victims.[16] In addition, as president of the *Reichsbank*, Funk was indirectly involved in the use of concentration camp labour - the bank set up a fund to the credit of the SS for the construction of factories to use concentration camp labourers. Funk was found guilty for war crimes and crimes against humanity. [17]

While the main objective of the trials at Nuremberg was to hold individual high-ranking civilian and military officials accountable for the Nazi regime's crimes, the prosecutors acknowledged that the owners and directors of large German companies played a key role in supporting and facilitating the regime and its crimes.[18] It was alleged before the IMT that, in order to execute a common plan, the defendants undertook acts that included using 'organizations of German business as instruments of economic mobilization for war.'[19] The chief the prosecutor at the IMT, Robert Jackson, wrote, '[I]t has at all times been the position of the United States that the great industrialists of Germany were guilty of the crimes charged in this Indictment quite as much as politicians, diplomats, and soldiers'.[20] Jackson wrote in his first report of his intention to:

> accuse a large number of individuals and officials who were in authority in the government, in the military establishment…and in the financial, industrial, and economic life of Germany who by all civilized standards are provable to be common criminals.[21]

Jonathan Bush documented how, in addition to the trial of Nazi officials at the IMT, the allies envisaged holding at least one other international trial that would target 'businesses or businessmen'.[22] In the end, the plan of holding a second international trial was dropped, and so

[16] T Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (Knopf 1992), 398.
[17] Trial of the Major War Criminals (n 2), Vol 1, 171, 304-07. For commentary see S Michalowski, 'No Complicity Liability for Funding Gross Human Rights Violations?' (2002) 30 Berkeley J Intl L 451, 476; CR Jakobsen, 'Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials whose Business Transactions Facilitate War Crimes and Crimes Against Humanity' (2005) 56 Air Force LR 176, 196.
[18] Bush (n 3); W Kaleck and M Saage-Maab, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes The Status Quo and its Challenges' (2010) 8(3) J Intl Criminal Justice 700, 701.
[19] Trial of the Major War Criminals (n 2), Vol. 1, 35, 183.
[20] Answer of the United States Prosecution to the Motion on Behalf of the Defendant Gustav Krupp von Bohlen, International Military Tribunal Document, 12 November 1945.
[21] RH Jackson, Report to the President of the United States (7 June 1945), in The Nuremberg Case 3, 9 (1947).
[22] Bush (n 3), 1113.

was the idea of prosecuting corporations.[23] Instead, individual allied countries held their trials in their respective zones of occupation of Germany.

Industrial Cases

On 20 December 1945, the Allied Control Council issued *Control Council Law No. 10*, which empowered any of the occupying authorities to try suspected war criminal in their respective occupied areas.[24] Based on this law, the United States Military Tribunal (USMT) held twelve subsequent trials, from 1946 to 1949 after the end of the *Trial of the Major War Criminals* before the IMT. Among these, is a series of cases known as the *Industrial Cases*, where German industrialists who collaborated with the Nazi regime were indicted for crimes against humanity, war crimes, complicity in the crime of aggression and mass murder, and aiding and abetting murder, torture, and other atrocities committed by the Nazis.[25] These business leaders, often working through their companies, had supplied poisonous gas to concentration camps knowing it would be used to exterminate people, sought slave labour for their factories, helped in the deportation, murder and inhumane treatment of slave workers, and made profits by plundering property in occupied Europe.[26]

These cases revealed an underlying implication that the corporations for which the industrialists worked had also committed international crimes.[27] During the trials, even though only individual businessmen were charged, and 'corporate liability formally was not at stake',[28] the tribunals adopted an institutional approach. For example, the prosecution considered 'responsibility on different levels of decision making instead of targeting only the head office'.[29] In practice, corporate and individual liability could not be strictly separated at all times.[30] The idea of the responsibility of the corporations was underlying, and transpires

[23] Ibid., 1162.
[24] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Berlin, 20 December 1945.
[25] Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, October 1946-April 1949 (United States Government Printing Office, 1953).
[26] Bush (n 3), 1105, 1113-14; A Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 Berkeley J Intl L 91.
[27] T Taylor, The Anatomy of the Nuremberg Trials, A Personal Memoir (Bloomsbury 1993).
[28] KC Priemel, 'Tales of Totalitarianism: Conflicting Narratives in the Industrialist Cases at Nuremberg' in KC Priemel and A Stiller (eds.), *Reassessing the Nuremberg Military Tribunals Transitional Justice, Trial Narratives, and Historiography* (Berghahn Books 2012), 170.
[29] Ibid.
[30] N Bernaz, 'Corporate Criminal Liability under International Law. The *New TV S.A.L.* and *Akhbar Beirut S.A.L.* Cases at the Special Tribunal for Lebanon' (2015) 13 J Intl Criminal Justice 313, 321.

from some of the judgments. For example, in the *Farben* case, the tribunal remarked:

> While the Farben organization, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organization as an instrument by and through which they committed the crimes enumerated in the indictment.[31]

In 1948, the USMT held five of the directors of *I.G. Farben*, a major German chemical and pharmaceutical manufacturer, the then largest corporation in Europe, criminally liable for the use of slave labour.[32] This was the first time that a court imposed liability on a group of persons who were collectively in charge of a company.[33] The *I.G. Farben* case represented the first attempt to hold individuals accountable for their business activity under international criminal law.[34] Because the Tribunal did not have jurisdiction over legal persons it could not render a verdict against *Farben* as a legal entity. But the USMT based much of its findings on the role of *Farben* as a corporate entity. The prosecution was of the opinion that the accused had used *Farben* as a tool to commit crimes against peace, war crimes and crimes against humanity.[35] The Tribunal noted: 'Auschwitz was financed and owned by Farben'.[36] It added, 'If not actually marching with the Wehrmacht, Farben at least was not far behind. But translating the criminal responsibility to personal and individual criminal acts is another matter'.[37]

This consideration points to a key challenge faced in this and other trials against corporate managers: establishing the criminal responsibility of the company itself separately from the responsibility of the individuals managing it. In the *Krupp* case, the Tribunal looked at the actions of the company as opposed to decisions or conduct of any individual director.[38] The

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[31] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. VIII [*I.G. Farben* case], 1108.
[32] Ibid. See also, F Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8(3) J Int Criminal Justice 783.
[33] Ramasastry (n 26), 104-08.
[34] Jessberg (n 32) 784.
[35] Ibid.
[36] *I.G. Farben* case (n 31), 1183-84.
[37] Ibid.
[38] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. IX *The United States of America v. Alfred Krupp et al*., Military Tribunal IIIA, 9 Trials of War Criminals (1948)

case involved the prosecution of twelve employees and officers for the commission of war crimes and crimes against humanity with respect to plunder of factories and other property in occupied Europe, and to the deportation and use of prisoners of war and concentration camp inmates as forced labourers in *Krupp* factories in Germany.[39] Six of the defendants were found guilty. As with the *Farben* decision, the Tribunal focused on the role of the company as such and decided that *Krupp* had violated *The Hague Regulations* in its seizure and confiscation of property in occupied countries.[40] The position of individuals within the company is what determined their liability.[41]

The responsibility of individual businessmen was framed both as direct and accomplice liability. The element of knowledge to establish complicity was discussed in detail in the *Industrial* cases and in the trial against Bruno Tesch. He was the owner of *Tesch & Stabenow*, a company that supplied the Auschwitz concentration camps with Zyklon B, a pesticide used by the Nazis in the gas chambers. Tesch was tried in the 1946 *Zyklon B* case by a British Military Tribunal in Hamburg.[42] The charge was that Tesch, 'in violation of the laws and usages of war, did supply poison gas used for the extermination of allied nationals interned in concentration camps, well knowing that the said gas was to be so used'.[43] The co-defendants named included Karl Weinbacher, the company general manager, and gas technician Joachim Drosihn. The crucial question for the tribunal was whether the accused knew of the purpose of the gas they supplied.[44] According to the tribunal, the prosecution proved that Tesch and Weinbacher had acted with the requisite knowledge. They were sentenced to death by hanging,[45] while Drosihn was acquitted.

The *Flick* case provides an innovative approach to the liability for financing crimes under international law.[46] The trial was conducted against Friedrich Flick and Otto Steinbrinck, two leading officials of the *Flick Concern*, and members of the 'Himmler's Circle of Friends', a

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[*Krupp* case]. See also, Ramasastry (n 26), 108-13; Bush (n 3), 1111-12; M Lippman, 'War Crimes Trials of German Industrialists: The "Other Schindlers" (1995) 9 Temple Intl Comp LJ 173, 229-49.

[39] *Krupp* case (n 38), 467

[40] Ibid., 1351-52. See also, Ramasastry (n 26), 108-13.

[41] Ramasastry (n 26), 113-14.

[42] Trial of Bruno Tesch and Two Others in Law Reports of Trials of War Criminals, The United Nations War Crimes Commission, Vol. 1 (HMSO 1947) [*Zyklon B* case].

[43] Ibid., 93-103.

[44] Ibid., 100.

[45] Ibid., 101

[46] Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.10, 1952, Vol VI *The United States of America v. Friedrich Flick et al.* [*Flick* case].

group that 'throughout the period of the Third Reich, worked closely with the [Schutzstaffel (SS)], met frequently and regularly with its leaders, and furnished aid, advice, and support to the SS, financial and otherwise'.[47] Himmler was the commander of the SS and the German Minister of the Interior, and was also responsible for the extermination policy in Germany's concentration camps. Flick and Steinbrink were charged with aiding and abetting criminal activities of the SS, including war crimes and crimes against humanity, and the enslavement and abuse of concentration camp inmates.[48] They were found to have provided 'extensive financial and other support' by profiting from slave labour in the camps.[49] The USMT found both guilty first observing that 'an organization like the SS that commits war crimes and crimes against humanity on a large scale could be nothing other than criminal'.[50] The tribunal continued, 'One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes'.[51]

Flick and Steinbrinck were convicted even though the prosecution could not show that any part of the money donated by either of them was directly used for criminal activities of the SS.[52] For Sabine Michalowski this is an interesting approach to one of the most complex issues in the context of liability for providing funds, that is, whether liability requires establishing a link between a particular loan or donation and specific violations committed by the recipient.[53] The Tribunal showed that in the context of financing, it was not necessary to prove that the contributions made by the defendants were intended for unlawful purposes. Rather, it was sufficient that some part of the receiving fund had such an intended use.[54] Funding that went toward an organization with such clear criminal purposes as the SS was regarded as contributing to maintaining it, eliminating the need to examine the exact use of the funds

[47] Ibid., 1217-23.
[48] Ibid., 103.
[49] Ibid.
[50] Ibid., 1217.
[51] Ibid., 1217-20. See also N Bernaz, 'Establishing Liability for Financial Complicity in International Crimes' in JP Bohoslavsky and J Letnar Cernic (eds.), *Making Sovereign Financing & Human Rights Work* (Hart 2014), 61, 69-70.
[52] Flick case (n 46), 1221.
[53] Michalowski (n 17), 476-78.
[54] Flick case (n 46), 1216-17, 1223. But see C Burchard, 'Ancillary and Neutral Business Contributions to 'Corporate-Political Core Crime' (2010) 8 J Intl Criminal Justice 919, 936-37, who suggests that the liability of the defendants in the Flick case rests exclusively on their membership in a criminal organization, the SS, and does therefore not provide any guidance as to the standards that apply with regard to liability as an accessory to the crime.

provided.[55] It is at this point that legal theories related to the liability of financial accomplices started, an area that has received contradictory court decisions and interpretations since then and present particular challenges in transitional justice contexts, as discussed in Chapter III.

The Ministries Case

The *Ministries* case, with 21 defendants, is another important post-World War II decision regarding the liability of bankers.[56] One of the defendants was Emil Puhl, who had been Deputy President of the *German Reichsbank* during the Third Reich and played an active role in arranging 'the receipt, classification, deposit, conversion and disposal of properties taken by the SS from victims exterminated in concentration camps'.[57] He was found guilty for war crimes and crimes against humanity for the administration of concentration and extermination camps.[58] Puhl was also charged with slave labour, including for negotiating a massive loan between the SS and *DEST*, a company specifically designed to utilize concentration camp labour.[59] The Tribunal held that although Puhl had held positions of considerable responsibility and authority, he had not played a decisive role and that it was doubtful whether Puhl 'did more than act as a conduit in these particular transactions'.[60] Accordingly, the Tribunal dismissed charges against Puhl on the slave labour count.[61]

But it is the case against Karl Rasche that set a precedent about commercial lending not giving rise of liability for gross human rights violations. Rasche was also charged in the *Ministries* case with different counts of war crimes and crimes against humanity, and with slave labour on the grounds that he had made loans to entities using slave labour.[62] Rasche was a member of the board of managers of *Dresdner Bank*, a private commercial bank in Germany characterized as the bank of the Third Reich.[63] In the report of the Office of Military Government, he was described as 'one of the key liaisons between the Dresdner Bank and the SS, Nazi Party, and government so that the bank might function as an integral part of the Nazi

[55] Flick case (n 46), 1217. See also, Michalowski (n 17), 476-78.
[56] Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10, Vol XIV *The United States of America v. Von Weizsaecker*, XIV [Ministries case].
[57] Ibid., 609.
[58] Ibid., 620-21.
[59] Ibid., 850-51.
[60] Ibid., 852.
[61] Michalowski (n 17), 474 -75.
[62] *Ministries* case (n 56), 852.
[63] Ibid., 621-22.

war machine'.[64]

The evidence in the trial established that 'the Dresdner Bank loaned very large sums of money to various SS enterprises which employed large numbers of inmates of concentration camps, and also to Reich enterprises and agencies engaged in the so-called resettlement programs'.[65] The Tribunal had to decide whether such loans would give rise to liability for war crimes and crimes against humanity, and first looked at Rasche's criminal responsibility for having been a member of Himmler's Circle of Friends, and for having approved large annual contributions by *Dresdner Bank* to a fund placed at Himmler's personal disposal.[66] The Tribunal rejected any liability of Rasche related to these contributions on the grounds that there was no evidence that 'Rasche knew that any part of the fund to which the bank made contributions was intended to be or was ever used by Himmler for any unlawful purposes'.[67]

The Tribunal, however, held that Rasche did have the requisite knowledge for the loans *Dresdner Bank* made to SS enterprises, which employed slave labour and otherwise funded the Nazi resettlement programme.[68] The Court reasoned that banks generally seek to learn the purposes of their loans as a matter of practice and found it inconceivable that Rasche did not have the necessary knowledge.[69] In this context, the Tribunal made a statement that has since been interpreted by some courts and commentators as authority for a general rejection of liability for commercial loans that finance gross human rights violations.[70] It identified 'the real question' as:

> …is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law?...A bank sells money or credit in the

[64] C Simpson, War Crimes of the Deutsche Bank And the Dresdner Bank: Office of the Military Government (U.S.) Reports 396 (Holmes and Meier 2002).
[65] Ministries case (n 56), 621.
[66] Ibid., 621-22.
[67] Ibid., 622.
[68] Ibid.
[69] Ibid.
[70] See eg, *Khulumani v. Barclay Nat'l Bank Ltd*., 504 F.3d 254, 292-93 (2d Cir. 2007); *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1088-90 (C.D. Cal. 2010); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); Khulumani, 504 F.3d at 276. See also, S Bhashyam, 'Knowledge or Purpose? The Khulumani Litigation and the Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act' (2008) 30 Cardozo L Rev 245, 269.

> same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit that the bank realizes from the transaction…Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint…, but the transaction can hardly be said to be a crime. Our duty is to bring to justice those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law. [71]

Michalowski rightly argues that the general conclusion drawn from this case that commercial loans are always exempt from complicity liability is put into doubt when examining the Tribunal decision in its entirety.[72] Under count seven Rasche was charged for war crimes and crimes against humanity in the context of slave labour for allegedly having 'participated in the financing of SS enterprises' that used concentration camp labour.[73] Because Rasche testified credibly as to having no knowledge of the slave-labour programme, he was found not guilty under this count.[74] The Tribunal rejected Rasche's liability under count seven not because making loans is an activity that is *per se* exempt from liability, but rather because there was not sufficient proof to justify holding Rasche personally criminally liable for the loans.[75]

More contemporary decisions have essentially followed the tribunal's reasoning in Rasche. For example, the *South African Apartheid Litigation*, discussed in Chapter III, reached the conclusion that commercial loans and other banking services do not result in complicit liability.[76] In the litigation brought fifty years after Nuremberg by Holocaust survivors against Swiss banks (also detailed in Chapter III), the defendant banks cited *Rasche* to demonstrate that the mere act of providing money or credit to finance criminal activity does not constitute a violation of customary international law, even where the bank had knowledge of the purpose for such financing.[77]

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[71] *Ministries* case (n 56), 622.
[72] Michalowski (n 17), 473-74.
[73] *Ministries* case (n 56), 853.
[74] Ibid., 854-55.
[75] Michalowski (n 17), 887-88; K Gallagher, 'Civil Litigation and Transnational Business' (2010) 8 J Intl Criminal Justice 745, 763; A Mamolea, 'The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap' (2011) 51 Santa Clara L Rev 79, 128-29; Ramasastry (n 26), 118.
[76] *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009).
[77] A Ramasastry, 'Secrets and Lies? Swiss Banks and International Human Rights' (1998) 31 Vand J Transnatl L 325.

Lesson from Nuremberg

The Nuremberg and subsequent trials provide important lessons for establishing corporate accountability through judicial processes in a transitional justice context. First, the concept of individual responsibility for crimes under international law was established for the first time. This provided support for the capacity of courts to adjudicate criminal cases whereby corporate officials are accused of committing gross human rights abuses. Although the IMT only prosecuted individuals, it recognised that legal persons can engage in criminal conduct. The Tribunal made clear that norms applicable to 'persons' applied to legal persons as well as individuals.[78]

Second, the involvement of the corporate officers was framed in terms of both direct as well as accomplice criminal liability.[79] The post World War II trials helped to understand the role that business enterprises have played in times of conflict or repression and to develop criteria of responsibility, in particular in relation to aiding and abetting.[80] Current notions of corporate responsibility for facilitating human rights abuses are indeed backed by legal theories whose origins can be traced back to these trials.[81]

Third, the position of the individual defendants within the corporation, including their decision-making authority, was a crucial factor for establishing liability.[82] For example, the tribunal found that Funk exercised a sufficiently influential position to be held personally criminally liable for the loans he authorized, whereas it acquitted Puhl and Rasche, finding that although also holding a position of authority, they did not play a decisive role.

Fourth, while only individuals were prosecuted, the *Industrial* cases linked the individual and the corporate responsibility, providing the initial jurisprudence for understanding how corporate actors may be held legally accountable.[83] Starting with *Farben*, the trials of German

[78] Nuremberg Judgment, The Accused Organizations, 1 October 1946, reprinted in 41 AJIL172 (1947); Charter of the International Military Tribunal (n 4), arts. 6.
[79] Kaleck and Saage-Maab (n 18), 702.
[80] RC Slye, 'Corporations, Veils and International Criminal Liability' (2008) 33 Brooklyn J Intl L 955; Bernaz, 'Corporate Criminal Liability under International Law' (n 30).
[81] JP Bohoslavsky and V Opgenhaffen, 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship' (2010) 23 Harvard Human Rights J 157, 159.
[82] Michalowski (n 17), 478-83.
[83] G Skinner, 'Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute' (2008) 71 Alb L Rev 321, 325, 343, 362; Bush (n 3); Michalowski (n 17), 478-83.

industrialists adopted an 'institutional' approach and highlighted the relationship between corporate activities and the commission of war crimes and crimes against humanity.[84] Florian Jessberg concludes:

> From the angle of today's international criminal law, the value of the [*Farben*] decision above all lies in having undertaken the attempt to highlight the responsibility of industry and business through the instruments of international criminal law.[85]

Corporate criminal liability was seriously explored, and while it was no adopted, it was never rejected as impermissible under international law. Corporate liability would have added a novel dimension to the emerging legal theory, by broadening the reach and impact international criminal law and enhancing the other features that have emerged from the Nuremberg trials, starting with the idea of an international criminal trial, or for crimes against peace and crimes against humanity.

Fifth, the issue of financial contribution was discussed at length in the *Industrial* cases, but the trials produced different opinions.[86] According to Bohoslavsky and Rulli, 'The notion of complicity for financial actors has been confusing to say the least, producing mixed jurisprudence'.[87] The first judicial representations of the idea that financing crimes could trigger responsibility were indeed contradictory, as evidenced by *Flick* and the *Ministries* cases.[88] In *Flick*, Flick and Steinbrinck were convicted because even though the prosecution could not prove that the money they had donated to the SS was directly used for criminal activities, the tribunal took it for granted that some of it had gone into maintaining this organization, regardless of whether it was spent on salaries or lethal gas.[89] In the *Ministries* case, the tribunal reached a different opinion – it recognised that money or credit are fungible commodities, which could be used for unlawful enterprises, but did not find it a crime under international law.[90] Nuremberg case law does not draw a clear line between the liability of

[84] *I.G. Farben* case (n 31), 1108.
[85] Jessberg (n 32), 802.
[86] Bohoslavsky and Opgenhaffen (n 81), 159.
[87] JP Bohoslavsky and M Rulli, 'Corporate Complicity and Finance as a "Killing Agent" The Relevance of the Chilean Case' (2010) JICJ 8, 829, 834.
[88] Bush (n 3), 1094; C Simpson (ed.), *War Crimes of the Deutsche Bank and the Dresdner Bank* (Holmes & Meyer 2002), 1-34.
[89] *Flick* case (n 46), 1217-23. See also, Bohoslavsky and Opgenhaffen (n 81), 159.
[90] *Ministries* case (n 56), 621-22, 1221.

who committed the crimes and who provided the financial means to make the commission of crimes possible.[91] But beyond the different legal conclusions, both cases recognized the substantial effect that money can have over a massive criminal campaign and affirmed the notion that loans can contribute to the commission of international crimes.[92]

Finally, the wider political context within which the post World War II cases were carried out is of great importance. American foreign policy was undergoing a change in its attitude to German industry. The original goal was the 'industrial disarmament' of Germany. But later on, in 1945-1946, the United States adopted the 'Truman Doctrine', which sought to refrain from severe reprisals against the industrialists.[93] German industry was not to be 'purged'; it was to be recruited against the new communist enemy. The subsequent trials were influenced by the Allies' intention to reintegrate the German economy into the Western system, and the German economic elites into the German society. Jessberg argues that the *Farben* trial may have been 'the expression of a justice that understood the accused to be prospective allies', and that that the comparatively mild judgment in *Farben* reflected the changed political instructions.[94] Here it is already possible to discern the tension between dealing with the past and shaping the future that confronts any intervention by international criminal law in post-conflict and transitional situations[95] - a point that is addressed also in relation to contemporary cases of domestic criminal liability, in Chapter III.

Indeed, at some point there were discussions about a second international trial being held at Nuremberg that would have targeted German businessmen and corporations.[96] But the appetite for such trial died out, and the idea was abandoned. The reason was that discussions about whether and how to try big German businesses for their alleged war crimes was part of a broader economy policy in the occupation of Germany.[97] Germany's industrial facilities, its ability to produce and distribute coal and electricity, and its currency were already in suspension. Bush articulates the sentiment in relation with *I.G. Farben*: public feeling was

[91] Bohoslavsky and Opgenhaffen (n 81), 174; JP Bohoslavsky and S Michalowski, 'Jus Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts - A Response to the World Bank Discussion Paper on Odious Debts' (2010) 48 Colum J Transnatl L 61.
[92] Bohoslavsky and Rulli (n 87), 834.
[93] Jessberg (n 32), 798.
[94] Ibid., 799.
[95] Ibid.
[96] Bush (n 3), 1105, 1113-14; D Bloxham, "'The Trial that Never Was": Why There Was No Second International Trial of Major War Criminals at Nuremberg' (2002) 87 J Hist Assn 41, 46-47.
[97] Bush (n 3), 1117.

centred around the notion that 'the sinister-seeming Farben, a massive octopus of a company with tentacles reaching around the globe, was fully complicit in the crimes of the Nazis'.[98] But, continues Bush:

> Even without counting its tens of thousands of slave labourers at any one time, it had a larger workforce than DuPont, Standard Oil (New Jersey), and Imperial Chemicals combined. It dominated the economic life of entire Latin American countries. Through its factories, patents, and cartel arrangements, it supplied vital commodities to the Wehrmacht, and was able to choke their supply to the Allies even during the war.[99]

West German authorities also brought few prosecutions against businessmen. One of the few cases was the prosecution in 1948 of Gerhard Peters, the former general manager of *Degesch*, a distribution company (in which *Farben* had a 42% stake) that manufactured Zyklon B for use at Auschwitz. Peters was first sentenced by a court in Frankfurt to six years in prison for acting as accessory to murder, and finally acquitted in a new trial in 1955.[100] Accountability in West Germany for international crimes committed by corporations and business officials was essentially non-existent. But the reasons for this were political and economic, rather than a matter of international legal theory. Despite having suitable doctrines of principal and accessory liability and complicity within their legal lexicon, Germans authorities decided not to pursue corporate cases. With the political currents running in favour of rebuilding the West German economy, the result was near-total impunity for corporations, which instead had resumed their place as pillars of the West German economy. In his 170-page essay that survey 'a story of legal energy and optimism in 1946-47, followed by a political about-face around 1948, with accountability yielding to amnesia'[101], Bush concludes:

> …perhaps the last lesson of Nuremberg is that innovative doctrines, vigorous trial programs, and a broad impulse toward accountability can, even together, be irrelevant…Germany turned out in time to be everything that the wartime Allies hoped for-peace-loving, democratic, prosperous, quiet-very much like Japan, with big

[98] Ibid., 1114.
[99] Ibid., 1117.
[100] CF Rüter and others (eds.), *Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungsverbrechen 1945–1999* (Amsterdam UP 1975), 100–225.
[101] Bush (n 3), 1240.

> industrial firms in both countries a crucial part of that prosperity…[S]urely a final, forgotten lesson of Nuremberg has to be that countries can be rebuilt and companies cleansed without legal accountability.[102]

I.2 The International Criminal Court

The International Criminal Court (ICC), an international tribunal that sits in The Hague, has jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes, and aggression. It does not have jurisdiction over corporations. Article 25 of the *Rome Statute of the International Criminal Court* limits the jurisdiction of the ICC to 'natural persons.'[103] There was, however, a proposal to add legal entities to the jurisdiction of the ICC during the negotiations of the Rome Statute. The French delegation proposed a restricted form of corporate criminal liability, limited to private (rather than public) corporations and requiring corporate criminal responsibility to be linked to the individual criminal responsibility of a leading member of a corporation.[104] The 1998 draft statute provided that in addition to natural persons the Court 'shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives'.[105] The French delegation believed that this inclusion would make it easier for victims of crimes to sue for restitution and compensation. The proposal was rejected because of a number of concerns.[106] First, that the Court would be confronted with overwhelming evidentiary problems when prosecuting corporations. Second, that there was not yet a recognised standard of criminal liability of corporations, which is still rejected in many national legal orders, and this international disparity would make the principle of complementarily unworkable.[107] No consensus was

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[102] Ibid.
[103] Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S 90, 94 [hereinafter Rome Statute], Art. 25(1).
[104] Report of the International Commission of Jurists Expert Panel on Corporate Complicity and International Crimes, *Corporate Complicty and Legal Accountabilty* (International Commission of Jurists 2008), 56.
[105] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998 [UN Diplomatic Conference of Plenipotentiaries], Draft Statute for the International Criminal Court and Draft Final Act, UN Doc A/CONF.183/2/Add.1 (1998).
[106] Summary Records of the Meetings of the Committee as a Whole, 26th Meeting, UN Doc. A/CONF.183/C.1/SR.26 (8 July 1998), 10. See also A Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference' in M Kamminga and S Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (Kluwer 2000), 139.
[107] UN Diplomatic Conference of Plenipotentiaries, Official Records, Vol. III, Reports and Other Documents [Rome Conference Official Records]. See also, WA Schabas, 'Enforcing international humanitarian law: Catching the accomplices' (2001) 83 IRRC, 842, 453.

reached and finally the Working Group dropped the draft provision.[108]

Arguably, expanding the scope of the ICC over corporations may also face the resistance of those worried that this would detract from the focus of the ICC on individual criminal responsibility and about the international criminal justice system being used to punish 'groups' rather that individuals, in conflict with the principle of individual responsibility for criminal offenses. Since the adoption of the Rome Statute, however, there has been persistent support, indicating that the idea of an international criminal court with jurisdiction over corporations has particular merit and utility and should be pursued further.[109] A special tribunal for international corporate liability has also been suggested, but the case is most often made to expand the jurisdiction of the ICC in a future amendment of the Rome Statute, given its existing institutional framework, broad geographical coverage, and future-oriented mandate.[110]

Currently, the ICC can, in theory, adjudicate corporate involvement in international crimes, when the focus is shifted from the corporation to the individuals acting on behalf of a corporation. Business people, as natural persons, do fall under the ICC personal jurisdiction. Shortly after the adoption of the Rome Statute, an article in the *Financial Times* had already warned that 'the treaty's accomplice liability provision could create international criminal liability for employees, officers and directors of corporations'.[111] The article continued, 'It takes little imagination to jump from complicity with human rights violations to complicity with crimes covered under the ICC Treaty'.[112] As William Schabas pointed out, the question, then, is how and to what extent these accomplices may be prosecuted by the ICC.[113]

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[108] Rome Conference Official Records (n 107), Vol. III. See also, P Saland, 'International criminal law principles' in R Lee (ed.), *The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999), 199.

[109] K Haigh, 'Extending the International Criminal Court's Jurisdiction to Corporations' (2008) 14(1) Australian J Human Rights, 199–219; J Kyriakakis, 'Corporate Criminal Liability and the ICC Statute. The Comparative Law Challenge' (2006) 56(3) Netherlands Intl LR and 'Corporations before International Criminal Courts: Implications for the International Criminal Justice' (2017) 30(1) LJIL; L Van den Herik, 'Subjecting Corporations to the ICC Regime: Analysing the Legal Counterarguments' in C Burchard, O Triffterer and J Vogel (eds.), *The Review Conference and the Future of the International Criminal Court* (Kluwer 2010), 155–74 and 'Corporations as Future Subjects of the International Criminal Court: An Exploration of the Counterarguments and Consequences' in C Stahn and L van den Herik (eds.), *Future Perspectives on International Criminal Justice* (Asser Press 2010), 350.

[110] J Sundell, 'Ill-Gotten Gains: The Case for International Corporate Criminal Liability' (2011) 20 Minn JIL 648, 675-78; Kyriakaki, 'Corporations before International Criminal Courts' (n 109).

[111] M Nyberg, 'At Risk from Complicity with Crimes' *Financial Times* (28 July 1998).

[112] Schabas, 'Enforcing international humanitarian law' (n 107), 439.

[113] Ibid., 441.

Luis Moreno Ocampo, the first prosecutor of the ICC, observed in 2003: 'officials of multinational corporations could be held accountable before the ICC for directly or indirectly facilitating conducts that leads to violations of international law'. [114] Moreno Ocampo further noted that he intended 'to investigate these companies to assert whether any of them should be brought before the ICC'.[115] Referring to the situation in the Democratic Republic of Congo (DRC)'s civil war, Moreno-Ocampo stated that clarifying the economic aspects of the alleged crimes was fundamental for preventing future crimes and prosecuting those already committed.[116] He was pointing to the activities of European and American companies exploiting gold, diamonds and oil in the DRC.[117] Ten years later, in 2013, Moreno Ocampo's successor, Fatou Bensouda, reaffirmed the commitment of the Office of the Prosecutor (OTP) to investigate business entities responsible for contributing to international crimes.[118] As she put it,

> Conflicts are driven either by financial enrichment or ideology: a thorough investigation of the finances behind a conflict therefore helps to identify suspects and develop a more complete picture of responsibility.[119]

The threats of the ICC prosecutors to open the door of the Rome Statute to crimes involving economic entities remains unheard to date, with no investigation undertaken so far. A few communications against business people have reached the ICC, but without leading to any prosecution.[120] In October 2014, representatives of Ecuadorian victims sent a communication to the OTP against the 'Chief Executive Officer of Chevron and any other corporate officer' of the company.[121] The heart of the case was *Chevron*'s dumping of toxic waste into Ecuador's

[114] L. Moreno Ocampo, Presentation by the Chief Prosecutor on the occasion of the press conference of 16 July 2003, ICC-OTP-20030724-28.
[115] Ibid.
[116] L Moreno-Ocampo, 'Communications Received by the Office of the Prosecutor of the ICC', 3, 4.
[117] Jessberg (n 32), 801.
[118] Office of the Prosecutor (OTP), Policy Paper on Case Selection and Prioritisation, 15 September 2016 [OTP Policy Paper]. See also, A Batesmith 'Corporate Criminal Responsibility for War Crimes and Other Violations of International Humanitarian Law: The Impact of the Business and Human Rights Movement' in C Harvey, J Summers and ND White (eds.), *Contemporary Challenges to the Laws of War: Essay in Honour of Professor Peter Rowe* (CUP 2014), 292.
[119] F Bensouda, Keynote address at the Paris Conference on International Corporate Responsibility in Conflict Zones, 21 March 2013, French Ministry of Foreign Affairs.
[120] MA Fairlie, 'The Hidden Costs of Strategic Communications for the International Criminal Court' (2016) 51 Texas Intl LJ 281.
[121] Legal Representative of Victims Mr Pablo Fajardo Mendoza and Mr Eduardo Bernabé Toledo, Communication Situation in Ecuador, October 2014.

Lago Agrio region. Because the ICC cannot look at events that occurred before its establishment on 1 July 2002, the communication focused only on *Chevron*'s strategy to avoid complying with the judgments of Ecuadorian courts on this matter. The communication asserted that *Chevron*, by deliberately refusing to comply with Ecuadorian judgments, had committed 'an attack against the civilian population of the Oriente'.[122] It argued that *Chevron* officers 'deliberately maintained the situation of contamination of the Oriente and the deathly health effects it causes' and that this could constitute a crime against humanity.[123] Chevron officers' actions cannot, however, be identified as crimes against humanity within the meaning of Article 7 of the Rome Statute.[124] Crimes against humanity are crimes of context: to establish such crimes, it is necessary to prove that certain criminal acts were 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[125] To be held criminally liable, *Chevron* executives would have to have committed certain criminal acts, within that context.[126] The complaint mentions a few of such acts, such as murder and persecution, but without explaining how the alleged perpetrators named in the complaint are supposed to have committed them.[127] In March 2015, the ICC decided that there was no basis to proceed in the case.[128]

In May 2017, a coalition of human rights groups submitted a communication to the ICC prosecutor asking to investigate the complicity of *Chiquita*'s executives in crimes against humanity in Colombia.[129] The communication traces the executives' involvement with payments made to Colombia paramilitaries between 1997 and 2004. 'At the time, Colombian paramilitaries were notorious for targeting civilians, among them banana workers and community leaders', a representative of the victims stated, 'but Chiquita's executives decided to continue giving money to paramilitaries'.[130] *Chiquita* pled guilty in a US federal court in

[122] Ibid.
[123] Ibid., 18.
[124] N Bernaz, 'Complaint to the International Criminal Court against the CEO of Chevron' 4 November 2014, Rights as Usual <http://rightsasusual.com/?p=895> (accessed 29 August 2017).
[125] Rome Statute (n 103), Art 7.
[126] Bernaz (n 124).
[127] Communication Situation in Ecuador (n 121), 40-46. See also, Bernaz (n 124).
[128] International Criminal Court, Ref OTP2014/036752, 16 March 2015.
[129] International Human Rights Clinic at Harvard Law School, International Federation for Human Rights (FIDH), and Corporación Colectivo de Abogados José Alvear Restrepo (CAJAR), 'The contribution of Chiquita corporate officials to crimes against humanity in Colombia. Article 15 Communication to the International Criminal Court' May 2017.
[130] International Human Rights Clinic at Harvard Law School, 'Human Rights Coalition Call on ICC to Investigate Role of Chiquita Executives in Contributing to Crimes Against Humanity' 18 May 2017.

2007 to illegally funding Colombian paramilitaries. But accountability for the executives who oversaw and authorized the payment scheme has been elusive. While civil litigation is pending in US courts against *Chiquita* executives, no criminal prosecution has been attempted and Colombia has not been able to exercise jurisdiction over them.[131] The communication came at a critical time in Colombia, as the country began to implement a peace agreement after nearly half a century of conflict. If the OTP decides to start an investigation into *Chiquita* officials for their payments to the paramilitaries it would be the first time the court examines the role of a corporation – through its executives – in international crimes.

Thematic Prosecutions

Another trend that may have implications for the ICC focus on the business dimensions of conflict are the so-called 'thematic prosecutions'. This term refers to the prosecutorial practice of selecting certain crimes and giving priority to particular phenomena within international criminal indictments, usually for purposes related to the best use of limited resources, but often also due to elevating attention on a given matter of international concern.[132] In September 2016, the OTP released a policy document on the office's selection and prioritisation of cases.[133] In relation to assessing the gravity of the crimes, one of the case selection criteria, the document highlights:

> The impact of the crimes may be assessed in light of…the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.[134]

The acts described in the policy (environmental destruction, illegal exploitation of natural resources and land confiscation) constitute serious human rights violations for millions of people across the world, especially in countries affected by conflict and poor governance. They often involve multinational corporations, particularly in the extractive and agribusiness

[131] See Chapter III.2
[132] MM de Guzman, 'An expressive Rationale for the Thematic Prosecution of Sex Crimes', in M Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic 2012).
[133] OTP Policy Paper (n 118).
[134] Ibid., para 41.

sectors. The new policy implies that these could be gateways to the commissions of international crimes under the Rome Statute. For this reason, the new policy has attracted the attention of those working in the business and human rights field, who view it as a potential tool to achieve justice for victims in a context of prevalent impunity.[135] *Global Witness*, an NGO, considered the policy a 'landmark shift in international criminal justice' and praised it as a move that 'could reshape how business is done in developing countries'.[136] Others have dismissed it as mere talk unlikely to lead to any real change.[137] Schabas remarks: 'One recalls the excitement when, thirteen years ago, the Prosecutor indicated that he would be looking at the business connections to war crimes and other atrocities. Did anything happen?'[138]

Indeed, nothing happened. The policy shift, however, could at least in theory have important implications in relation to both corporate behaviour and activists' advocacy work.[139] Arguably, it is in relation to crimes against humanity and war crimes that the new policy is most likely to change the practice of the OTP because these two crimes can be committed 'by means of' the conduct referred to in the policy - while the crimes of aggression and genocide cannot.[140] And it is particularly the effect of the policy on the crime of pillage that could lead to changes in the area of corporate accountability.

The Rome Statute describes pillaging as the appropriation of property without the consent of the owner, with intention to deprive the owner of the property 'in the context of' an armed conflict.[141] Although the provisions on pillaging do not mention natural resources, it is reasonable to interpret 'property' as to include natural resources and consider that pillaging of

[135] J Vidal and O Bowcott, 'ICC Widens Remit to Include Environmental Destruction Cases' 15 September 2016 The Guardian; Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper', (n 12); ET Cusato, 'Beyond Symbolism Problems and Prospects with Prosecuting Environmental Destruction before the ICC' (2017).
[136] Global Witness, 'Company Executives Could Now be Tried for Land Grabs and Environmental Destruction', 15 September 2016.
[137] W Schabas, 'Feeding Time at the Office of the Prosecutor' 23 November 2016 International Criminal Justice Today, American Bar Association's International Criminal Court Project, 23 November 2016, available online at <https://www.international-criminal-justice-today.org/arguendo/icc-prosecutors-perpetuation-of-the-fiction-of-objectivity/> (accessed 29 August 2017).
[138] Ibid.
[139] Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper', (n 12); Global Witness (n 136); Vidal and Bowcott (n 135).
[140] Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper', (n 12).
[141] Rome Statute (n 103), Arts 8(2)(b)(xvi) and 8(2)(e)(v), which establish the war crime of 'pillaging a town or place' in international and non-international armed conflicts respectively.

natural resources falls within the remit of the ICC.[142] Different commentators have argued for the prosecution of the crime of pillage for acts that amount to plundering a country's natural resources. For example, van den Herik and Dam-de Jong argue that existing principles of international criminal law ought to be directed to address the illegal exploitation of natural resources during a conflict.[143]

The question of natural resources are increasingly being recognised as a priority in transitional justice processes.[144] Resources are a natural connecting point for post-conflict development and transitional justice. While rarely the single, driving cause of conflict, links between conflict and natural resources are present in every conflict. As Olga Martin-Ortega points out, although the majority of modern conflicts are not fought over natural resources, once the fighting starts all parties tend to consolidate their positions by exploiting the financial opportunities that resource access provides.[145] Michael Ross has linked natural resource extraction to an increased likelihood of authoritarianism.[146] There are a few examples of efforts to hold perpetrators of pillaging crimes legally accountable. A case at the International Court of Justice found that Uganda failed in its obligation to prevent the pillage of natural resources by its armed forces and non-state collaborators in the DRC.[147] Charges against the Revolutionary United Front and Charles Taylor at the Special Court for Sierra Leone included crimes directly associated with efforts to control diamond mines in Sierra Leone.[148] Truth commissions and other investigative bodies across different countries have analysed the link

[142] MA Lundberg, 'The Plunder of Natural Resources During War: a War Crime' (2007-2008) 39 Georgetown JIL 495, 507-12.
[143] L van den Herik and D 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' (2011) 15 Criminal L Forum, 250.
[144] SS Nichols, 'Reimagining Transitional Justice for an Enduring Peace: Accounting for Natural Resources in Conflict' in DN Sharp (ed.), *Justice and Economic Violence in Transition* (Springer 2014) 203, 211; E Harwell and P Le Billon, 'Natural Connections: Linking Transitional Justice and Development Trough a Focus on Natural Resources' in P de Greiff and R Duthie, *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009) 282, 283; M Ross, 'What Do We Know About Natural Resources and Civil War?' (2004) 41(3) J Peace Research.
[145] O Martin-Ortega, 'Business and Human Rights in Conflict' (2008) Carnegie Council for Ethics in Intl Affairs, 274. See also, P Le Billon, *Wars of Plunder* (Columbia University Press 2012); ML Ross, *The Oil Curse* (Princeton University Press 2012).
[146] ML Ross, 'Does Oil Hinder Democracy?' (2001) 53(3) World Politics 325.
[147] International Court of Justice, Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Judgment, ICJ Reports 19 December 2005, 168.
[148] Special Court of Sierra Leone, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01, Indictment, 3 March 2003.

between natural resource exploitation and conflict to some extent.[149] As detailed in Chapter IV, a number of those (for example in Liberia, East Timor, Sierra Leone, and the DRC) have also identified the responsibilities of corporations and businesspeople in their final reports. The current reconsideration and expansion of transitional justice may pave the way for further investigating into the role of natural resources in conflicts.[150] Arguably, the new policy paper, which mentions the illegal exploitation of natural resources as a conduct the OTP will pay more attention to, is a step in that direction.[151]

The new policy could influence new communications brought to the ICC. Before the release of the policy paper the OTP had already received at least two communications related to one of the conducts the office had specifically stated it would pay attention to, *viz.* land confiscation. In 2010 the OTP initiated a preliminary examination of the situation in Honduras in this context.[152] In particular, the situation that arose in the Bajo Aguán region involved the killings of at least 100 civilians and other acts of violence by state and private security forces in land disputes between individual landowners and private corporations on one side, and peasant movements on the other side.[153] In 2015, the OTP decided not to proceed because 'in the absence of sufficient information on links and commonality of features between the multiple alleged crimes' it found insufficient evidence to conclude to the existence of a 'course of conduct' within the meaning of crimes against humanity.[154] In 2014, the OTP received a communication asking for it to investigate allegations that the 'widespread and systematic land grabbing conducted by the Cambodian ruling elite for over a decade amounts to a crime against humanity'.[155] The new policy may lead the OTP to open a preliminary

[149] See eg, Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (October 2004), Vol 2; Commission for Reception, Truth and Reconciliation Timor-Leste, *Chega!* (October 2005), parts 7 and 2, Annex A (esp. paras. 128–132); Chapter IV. See also, Nichols (n 144), 203.
[150] Nichols (n 144), 205.
[151] Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper', (n 12); PJ Keenan, 'Conflict Minerals and the Law of Pillage' (2013-2014) 14 Chicago JIL 524, 535-538.
[152] The Office of the Prosecutor, Situation in Honduras Article 5 Report, October 2015.
[153] Ibid., 43.
[154] Ibid., 49.
[155] Global Diligence, 'Communication Under Article 15 of the Rome Statute of the International Criminal Court. The Commission of Crimes Against Humanity in Cambodia. July 2002 to Present' <https://www.fidh.org/IMG/pdf/executive_summary-2.pdf> (accessed 30 August 2017). See also J Embree, 'Criminalizing Land-Grabbing: Arguing for ICC Involvement in the Cambodian Land Concession Crisis' (2015) 27 Florida JIL 399.

examination of the situation in Cambodia, and, if more evidence is brought concerning events in Honduras, to move the preliminary examination to the next stage.[156]

It is likely that the new policy paper is going to result in an increase of communications filed by civil society organizations on issues related to the exploitation of natural resources and land confiscation. Bernaz raised the concern that '[t]he language of the policy paper, coupled with the desire of some organizations to obtain justice, may lead to…the erroneous belief that the Court's jurisdiction has changed to encompass land grabbing as a stand-alone offence'.[157] This might encourage the filing of manifestly unfounded communications, which arguably waste the scarce resource of the OTP.[158] Megan Fairlie defines 'strategic communications' as 'highly publicized investigation requests aimed not at securing any ICC-related activity, but at obtaining some non-Court related advantage'.[159] The 'appeal of the technique', she argues, 'is obvious: much good can come from directing international attention to the many unthinkable atrocities taking place around the globe'.[160] Despite this risk, the new policy paper is important for its potential impacts on business behaviour and advocacy work of business and human rights activists. Even a NGO communication with little chance to pass the admissibility stage, if picked up by media, could lead to reputational damage for companies, and increased public awareness of the issue.

I.3 The *ad hoc* Tribunals

The two *ad hoc* tribunals, established for the former Yugoslavia and for Rwanda in 1993 and 1994 respectively, expressly provided that they had jurisdiction 'over natural persons' thus excluding prosecution of corporate bodies or organizations.[161] The Security Council resolution establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY) said it was for the purpose of prosecuting 'natural persons' responsible for serious violation of

[156] Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper' (n 12); Global Diligence, 'ICC Cambodian Case Study (n 155).
[157] Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper' (n 12), 9.
[158] Ibid.
[159] MA Fairlie, 'The Hidden Costs of Strategic Communications for the International Criminal Court' (2016) 51 Texas ILJ 281, 283.
[160] Ibid.
[161] Statute of the International Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 art. 6 (1993); Statute of the International Tribunal for Rwanda, U.N. Doc. S/RES/955 art. 5 (1994). See also W Schabas, *The UN International Criminal Tribunals* (Cambridge University Press 2006); OK Fauchald and J Stigen, 'Corporate Responsibility Before International Institutions' (2005) 40 Geo Wash Intl L Rev 1025.

international humanitarian laws. The then UN Secretary-General Boutros-Ghali made a passing reference to the desirability of criminalising certain juridical persons 'such as an association or organisation' under the Statute of the ICTY, but ultimately rejected this idea in favour of focusing on natural persons.[162] *Resolution 955*, which established the International Criminal Tribunal for Rwanda (ICTR), said the tribunal was targeted at 'natural persons' responsible for genocide.[163] Arguably, the exclusion of jurisdiction over legal persons was partly due to crimes in the contexts of the former Yugoslavia and Rwanda not involving businesses to any great extent.

The Special Court for Sierra Leone (SCLS) statute did not specifically referred to natural persons only. Thus it did not explicitly exclude jurisdiction over legal persons, but it did not explicitly provide for it. The report of the Secretary General on the draft statute did not explain why the limitation to 'natural persons' provision was not included.[164] Mats Berdal and David Malone argued that this might be a reflection of a specific interest in corporate liability in the Sierra Leone conflict.[165] Theoretically, the SCSL could have prosecuted corporate entities. Despite this possibility, however, SCSL prosecutions have been confined to natural persons.[166]

While international criminal tribunals have not used jurisdiction over corporations over international crimes, they have prosecuted and convicted corporate officials who supported international crimes.[167] Key cases are the ones at the ICTR involving *Radio Télévision Libre des Mille Collines*.[168] The station broadcasted from July 1993 to July 1994 and it was determined by the Tribunal that its propaganda and vindictive speech incited the Rwandan genocide. In 2003, prosecutors of the ICTR sought life sentences against Ferdinand Nahimana, a director of the radio, and Jean Bosco Barayagwiza, associated with the station. The ICTR also prosecuted Hassan Ngeze, the founder and director of *Kangura* newspaper, known for spreading anti-Tutsi propaganda. The court consolidated the indictment of the three men into a

[162] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, para. 51, 3 May 1993 U.N. Doc. S/25704.
[163] Schabas, The UN International Criminal Tribunals (n 161), 138.
[164] Security Council Resolution 1385 on the Situation in Sierra Leone, U.N. Doc. S/RES/1385 2001.
[165] M Berdal and D Malone, *Greed and Grievance: Economic Agendas in Civil Wars* (International Development Research Centre 2000).
[166] Schabas, The UN International Criminal Tribunals (n 161) 139.
[167] International Commission of Jurists (n 104), Vol 2, 6.
[168] *International Criminal tribunal for Rwanda (*ICTR), *The Prosecutor* v. *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze (2003).*

single trial, known as the *Media Case*.[169] This trial was the first time since Nuremberg that the role of the media was examined as a component of international criminal law. Nahimana, Barayagwiza and Ngeze were convicted on counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and crimes against humanity. Nahimana and Ngeze were sentenced to life imprisonment and Barayagwiza to 35 years. Upon appeal, in 2007, Nahimana and Ngeze's sentences were reduced to 30 and 35 years respectively. Later, in 2009, Valeria Berneriki, a broadcaster, was also found guilty of incitement to genocide by a *gacaca* court (traditional community justice courts of Rwanda, revived in 2001), and sentenced to life imprisonment.[170]

In the case against Alfred Musema, the director of a tea factory, the prosecutor alleged that Musema transported armed attackers, including employees of the factory, to different locations, and ordered them to attack Tutsis seeking refuge there.[171] He exercised legal and financial control over his employees, including the power to appoint or remove them and to prevent or to punish their use of factory equipment that was used in the crimes.[172] He was held responsible for the actions of his employees and convicted of genocide, but the conviction was not directly related to his business activities.

So far, no international criminal tribunal has had jurisdiction over corporations for crimes under international law. In 2014, however, the Special Tribunal for Lebanon decided in two cases, *New TV S.A.L* and *Akhbar Beirut S.A.L.*, that it could assert jurisdiction over corporations for the offence of contempt of court.[173] The Appeals Panel ruling in *New TV* was the first decision by an international criminal tribunal asserting jurisdiction over corporations, although not for human rights violations or international crimes.[174] Its findings were then confirmed in the *Akhbar Beirut* appeal decision. The decision was in relation to the prosecution of *Al-Akhbar* newspaper and *Al-Jadeed TV* as well as two employees, Ibrahim al-Amin and Karma al-Khayat on charges of contempt of court.[175] The charges were brought against them for publishing information about secret witnesses on whose testimonies the

[169] Ibid..
[170] Ibid.
[171] ICTR, Prosecutor v. Alfred Musema (ICTR-96-13).
[172] ICTR, Judgment, Musema (ICTR-96-13-T), Trial Chamber, 27 January 2000; Judgment, Musema (ICTR-96-13-A), Appeals Chamber, 16 November 2001.
[173] Special Tribunal for Lebanon, *New TV S.A.L* and *Akhbar Beirut S.A.L.*, STL-14-05.
[174] Bernaz, 'Corporate Criminal Liability under International Law' (n 30), 313-30.
[175] *New TV S.A.L.* Appeal Decision, 66.

prosecution relied to issue indictments. The STL's Contempt Judge had issued a decision stating that the Tribunal prosecutes individuals involved in the assassination of former Lebanese Prime Minister, Rafik Hariri, not legal persons, concluding that the STL had no personal jurisdiction to prosecute *Al-Jadeed TV*.[176] He decided to proceed with the prosecution against Khayat, but not the company for which she worked. But the appeals panel reversed this decision. It expanded the jurisdiction of the tribunal, reiterating that it was not restricted to the prosecution of individuals, but included the prosecution of legal persons.[177]

The STL relied on the point that even if corporate liability is not included in the Rome Statute, this does not mean that the concept does not exist under international law. The STL elaborated on its decision:

> The omission of legal persons from the Rome Statute should not be interpreted as a concerted exercise that reflected a legal view that legal persons are completely beyond the purview of international criminal law. We thus hold that no definitive legal conclusion can be drawn from the exclusion of legal persons from the jurisdiction *ratione personae* of the ICC. Instead, it is a reflection of the lack of a political (rather than legal) consensus to provide such jurisdiction in the Rome Statute.[178]

The scope of this decision is narrow and it does not represent a breakthrough in terms of corporate accountability for human rights violations or international crimes. It is, nonetheless important as it establishes for the first time that an international tribunal can exercise jurisdiction over business entities. In this context, the STL decision is of great conceptual importance.[179] Once the precedent is set, other courts may expand the subject matter to include human rights violations and crimes under international law. The *New TV* case may be relied upon in future business and human rights litigation as evidence that corporations may commit crimes that can be prosecuted at the international level. As such, this decision may have important practical consequences. For example, in *Kiobel*, analysed in Chapter III, a US Court of Appeals asserted: 'although international law has sometimes extended the scope of liability

[176] Ibid., Contempt Judge.
[177] Ibid., Appeal Decision, 66.
[178] Ibid.
[179] Bernaz, 'Corporate Criminal Liability under International Law' (n 30), 313-21.

for a violation of a given norm to individuals, it has never extended the scope of liability to a corporation'.[180] After the *New TV* decision this is no longer true. It is possible and probable that this decision will not remain an isolated one, and that other courts, including domestic courts, may be influenced by this precedent and seek to consolidate it to address the issue of corporate accountability, including in transitional justice contexts.[181]

Conclusion

The motivation for calls to extend international criminal jurisdiction over corporations vary, but most arguments operate on the premise that corporations can, and do, commit or assist in international crimes, and that individual criminal responsibility alone is insufficient to address the realities of corporate crime in modern conflicts.[182] Contemporary conflict studies demonstrate that many wars are rooted in competition over resources and in economic inequality, with the resulting calls for a new generation of international criminal law addressing economic actors and economic crimes.[183] Relatedly, there is the argument that if a goal of international criminal law is to support durable peace, then addressing economic networks that sustain conflicts should be a crucial feature of international criminal practice.[184] Human rights scholars point to the current lacuna in governance, which see corporations enjoying impunity for abuses that overlap with violations of international criminal law.[185] Others point to the prosecutions of industrialists after World War II to claim that contemporary corporate responsibility for international crimes would honour the legacy of Nuremberg.[186] Some advance a legal claim to support calls for institutional competence over corporations committing international crimes: that customary international criminal norms

[180] *Kiobel v. Royal Dutch Petroleum* Co. 621 F3d 111, 120 (2d. Cir. 2010).
[181] Bernaz, 'Corporate Criminal Liability under International Law' (n 30), 329-30.
[182] Kyriakaki, 'Corporations before International Criminal Courts' (n 109), 231; Batesmith (n 118), 286; J Stewart, 'A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity' (2013) 16(2) New Criminal L Rev 261.
[183] van den Herik and Dam-De Jong (n 143); I Eberechi, 'Armed Conflicts in Africa and Western Complicity: A Disincentive for African Union's Cooperation with the ICC' (2009) 3 African J Legal Studies 53.
[184] eg, M Delas-Marty, 'Ambiguities and Lacunae: The International Criminal Court Ten Years On' (2013) 11 JICJ 553, 557.
[185] Kyriakaki, 'Corporations before International Criminal Courts' (n 109), 223; M Ezeudu, 'Revisiting Corporate Violations of Human Rights in Nigeria's Niger Delta Region: Canvassing the Potential Role of the International Criminal Court' (2011) 11 African Human Rights LJ 23; L van den Herik and J Letnar Cernic, 'Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again' (2010) 8 JICJ 725.
[186] eg, T Giannini and S Farbstein, 'Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights' (2010) 52 HILJ 119.

apply equally to corporations as they do to natural persons, with the only distinction lying in the jurisdictional limits of international courts to date.[187]

The pursuit of corporate offenders under international criminal law could have positive implications in at least three areas: i) in setting a framework that promotes deterrence of such crimes; ii) in fostering the legitimacy range and effectiveness of the international criminal system; and iii) in overcoming certain obstacles of international human rights law.[188] First, the deterrent effect of international criminal prosecutions is routinely criticized on the basis that, among other things, it presupposes a psychologically rational actor where such may not exist.[189] However, as some scholars have noted, the ideological presuppositions of criminal law's rational actor may be more accommodating to corporate persons than to human beings.[190] As Joanna Kyriakakis puts it,

> In direct contrast to the usual contention that criminal law is necessarily most effective when responsibility is atomized to the human agent, the proposition is that it is potentially more so when directed at legal entities that are constitutionally designed to behave rationally in terms of engaging in emotionally and socially disengaged cost-benefit analysis. [191]

Second, in relation to the legitimacy of the international criminal system, it is the phenomenon of the transnational identity of the corporation that is particularly pertinent. Multinational corporations continue to be primarily headquartered in developed countries (sometimes called 'the global North'), while the dynamics that press against corporate accountability for business-related human rights abuses, and where these tend to be most egregious, are most pronounced in underdeveloped countries ('the global South').[192] Kyriakakis argues that an

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[187] eg, Clapham (n 1), 74-5, 251, 267; V Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8 JICJ 895, at 896-99.

[188] K Cronin-Furman and A Taub, 'Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice', in W Schabas, Y McDermott and N Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013), 435.

[189] N Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 Modern L Rev 346, 365.

[190] A Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) Human Rights L Rev 511, 524; Kyriakaki, 'Corporations before International Criminal Courts' (n 109), 236

[191] Kyriakaki, 'Corporations before International Criminal Courts' (n 109), 237

[192] B Roach, 'A Primer on Multinational Corporations' in AD Chandler and B Mazlish (eds.), *Leviathans: Multinational Corporations and the New Global History* (Cambridge University Press 2005), 19, 24-28; O De

international criminal court addressing this phenomenon through appropriate prosecutions 'provides the opportunity for international criminal jurisprudence to construct more complete narratives of power, law and responsibility for otherwise apparently localized conflicts'.[193] Further, Jordan Sundell notes:

> Local populations, if they notice the proceedings at all, often view international tribunals' brand of justice as distinctly Western. In the case of corporate offenses, however, the target audience is not the local population, but rather multinational corporations. An international trial in such a situation would not go unnoticed by the relevant actors. Nor would it generally be perceived as Occidental bias or victor's justice since a large percentage of multinational corporations come from the developed world.[194]

Third, international criminal law may also overcome certain obstacles of human rights law. While it is still largely debated whether non-state actors, and in particular corporations, are bound by international human rights law, from a normative point of view there are no obstacles for an international criminal tribunal to have jurisdiction over corporations.[195] Conceptually, corporations are bound as individuals are by the prohibitions underlying the core crime of international law. Ingrid Gubbay, head of human rights litigation at *Hausfeld*, rejects the idea that the international criminal tribunals' limitation of jurisdiction over natural persons means that corporate liability for international crimes does not exist under international law.[196] The fact that these institutions' jurisdiction is limited to individual criminal liability and does not extent to corporate liability 'says nothing about the existence or non existence of a norm'. [197] As a 2007 report by the Special Representative on business and

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Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in P Alston (ed.), *Non-State Actors and Human Rights* (OUP 2005), 227, 238-39; D Spar and D Yoffie, 'Multinational Enterprises and the Prospects for Justice' (1999) 52(2) J Intl Affairs 557.

[193] Kyriakaki, 'Corporations before International Criminal Courts' (n 109), 231.

[194] J Sundell, 'Ill-Gotten Gains: The Case for International Corporate Criminal Liability' (2011) 20 Minnesota JIL 648.

[195] Clapham (n 1), 25-57; van den Herik and Letnar Černič (n 183).

[196] Lecture by I Gubbay, Hausfeld & Co LLP, at Institute of Advanced Legal Studies in London, 19 February 2013.

[197] Ibid.

human rights concluded, corporations can be held liable under similar principles that are used to hold individuals liable for genocide, crimes against humanity, and war crimes.[198]

Andrew Clapham, writing in 2008, said that it was imaginable that the jurisdiction of the international criminal tribunals could be expanded to include corporations, arguing that the exclusion of legal persons could be seen as 'the consequence of a rule of procedure rather than the inevitable result of application of international criminal law'.[199] Ten years after, the only international tribunal taking on new cases is the ICC and, while it does not appear likely that there will be an imminent expansion of its jurisdiction to include corporations, there are no conceptual reasons why corporations should be immune from liability under international criminal law.[200] The idea has never been clearly rejected.[201] Instead, as Bernaz points out, 'a closer look at both the law and the practice from a historical perspective reveals a mixed picture when it comes to the idea of corporate liability under international criminal law'.[202]

Current notions of corporate responsibility for facilitating human rights abuses are backed by legal theories that originated in Nuremberg. As seen above, although the IMT only prosecuted individuals, it recognised that legal persons can engage in criminal conduct, labelling the Nazi leadership corps, the SS and the Gestapo as 'criminal'.[203] In the trials of German industrialists, the idea of the responsibility of the corporations was an underlying element in some of the judgments.[204] Some scholars have suggested that concerns over the extension of the ICC jurisdiction are far from insurmountable and they do not preclude states parties to the ICC from extending personal jurisdiction of the Court to legal persons in a future amendment of the Rome Statute.[205]

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[198] Report of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises John Ruggie, 'Business and human rights: Mapping international standards of responsibility and accountability of corporate acts' (February 2007), A/HRC/4/035, para 28.
[199] A Clapham, 'Extending International Criminal Law beyond the Individuals to Corporations and Armed Opposition Groups' (2008) 5(4) JICJ 902.
[200] RM Bratspies, "'Organs of Society": A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities' (2005) 13 Michigan State JIL 9; Bernaz, 'Corporate Criminal Liability under International Law' (n 30), 329-30.
[201] Bernaz, 'Corporate Criminal Liability under International Law' (n 30), 329-30.
[202] Ibid.
[203] International Military Tribunal, Judgement and Sentences (1 October 1946), reprinted in (1947) 41 AJIL 172.
[204] *I.G. Farben* case (n 31), 1108.
[205] J Kyriakakis, 'Corporations and the International Criminal Court: The Complementary Objection Stripped Bare' (2008) 19 Criminal L Forum 115, 120-21, 151.

Moreover, the extraterritorial exercise of jurisdiction is more accepted in international criminal law than it is under human rights law.[206] Many state parties to the Rome Statute have vested their courts with universal jurisdiction upon the implementation of the Statute in their domestic codes. By contrast, these same countries are hesitant about regulating corporations headquartered in their territory for extraterritorial corporate activities. Larissa van den Herik and Jernej Letnar Černič argue that the acceptance of corporate responsibility under international criminal law may have beneficial effects on the human rights discussion in terms of recognizing the legal personality of corporations under international law.[207]

The international criminal law framework, however, cannot serve as an adequate enforcement tool of human rights law.[208] International criminal law only covers the most serious human rights violations: genocide, crimes against humanity and war crimes.[209] Even if corporations were in the future accepted as subjects of the ICC, and even considering the focus of the OTP thematic prosecution over natural resources exploitation and land grabs, corporations remain unlikely to become the primary focus of an ICC prosecutor. The contextual element of war crimes and crimes against humanity and the specific intent required for genocide limit the scope of application of international crimes at least in practical terms. Thus, while international criminal law could address crimes attributable to corporations, it would intervene only in extraordinary circumstances.[210]

Despite prosecutions on accomplice liability grounds, international courts concentrate on prosecuting people who were directly involved in committing crimes, in particular military or political officials.[211] By contrast, individual business people, often only play a supportive role in the commission of international crimes. The priority is to prosecute the 'most serious crimes of concern to the international community as a whole'. [212] The ICC prosecutorial strategy is to

[206] E Engle, 'Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?' (2006) 20 St John's J Legal Commentary 291.
[207] van den Herik and Letnar Černič (n 183), 726-27.
[208] Ibid.
[209] Ibid., 742-43.
[210] N Farrell, 'Attributing Criminal Liability to Corporate Actors Some Lessons from the International Tribunals' (2010) 8(3) JICJ 872.
[211] A Marston Danner and JS Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' (2005) 93 California L Rev 75; JD Ohlin, 'Joint Intentions to Commit International Crimes' (2011) 11 Chicago JIL 721-25; MJ Kelly, 'Grafting the Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities' (2010) 24 Emory Intl L Rev 671.
[212] Rome Statute (n 103), Art. 25.

'select for prosecution those situated at the highest echelons of responsibility'. [213] Businesspeople and corporations would rarely meet the criteria for ICC prosecution as in most cases they are not among those masterminding international crimes, but they, for the most part, rather benefit from a given situation and exploit the financial opportunities. Investigations initiated, or not initiated, by the OTP may hint that business responsibility may not be 'of sufficient gravity to justify further action.'[214] Too broad a swathe of prosecutions for a variety of crimes may conflict with the ICC's focus on a small number of perpetrators of the most notorious offenses. Therefore the responsibility of corporations for their involvement in international crimes has been of marginal interest in international prosecution efforts.[215] This is arguably a necessary limitation of international criminal law that remains unlikely to be overcome. For these reasons, international criminal law does not currently offer an effective avenue to seek remedy for corporate human rights abuses in transitional justice contexts. The next Chapter assesses whether the regional human rights systems may be a suitable option.

[213] Prosecutorial Strategy 2009-2012, The Hague, 1 February 2010, 19.
[214] H Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8(3) JICJ 852.
[215] Jessberg (n 32), 801; Kaleck and Saage-Maab (n 18), 710.

II. REGIONAL HUMAN RIGHTS SYSTEMS

Introduction

After the assessment of the limitations of international criminal law as a remedy for corporate human rights abuses in the previous chapter, this chapter turns to the analysis of the potential of the regional human rights systems in this area. The European, Inter-American and African regional human rights systems have developed judicial, legislative and administrative mechanisms to provide remedies to people, who have suffered human rights violations within states party to the respective regional human rights conventions.[1] Arguably, the regional systems also contribute to providing remedies in transitional justice contexts, as they order and supervise national prosecutions and reparations measures when states emerging from conflict or repression have been unable or unwilling to act.[2] These mechanisms can in some instances also remedy violations involving business activities through scrutiny of complaints made against states that fail to prevent, investigate or redress human rights violations related to corporate activities. Bodies set up to monitor the implementation of the regional treaties can, for example, order new investigations into corporate abuses and can contribute to shape reparations programmes at national level.

The Inter-American Court of Human Rights, in particular, has provided important contributions to the analysis of evidence of corporate abuses and the provision of remedy and reparations for victims, including in transitional justice contexts.[3] A decision of the African Commission of August 2017 ordering the Democratic Republic of the Congo to investigate the role of an Australian mining company in a village massacre during the 1998 civil war also provides innovative precedents in this area.[4] This chapter shows that while the regional systems are not mandated to directly investigate corporate human rights abuses (they

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953; American Convention on Human Rights, signed 22 November 1969, entered into force 18 July 1978, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143); African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986.
[2] A Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 AJIL 1.
[3] eg, Inter-American Court of Human Rights (IACtHR), *Santo Domingo Massacre v. Colombia* (2012), 135; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (2013).
[4] African Commission on Human and Peoples' Rights (ACHPR), *Institute for Human Rights and Development in Africa and Others v. Democratic Republic of Congo*, Communication 393/10, 9 June 2016 [*IHRDA v DRC*].

investigate violations by states parties, or circumstances where state parties have failed to provide adequate remedies to violations that occur on their territory), they can offer a complementary avenue for victims that have failed to obtain justice and reparations at the national level. This is particularly important in transitional justice contexts where, for a number of reasons detailed in the next chapter, national litigation is rarely an effective option. This chapter examines the jurisprudence of the Inter-American (Section II.1), the African (II.2) and the European systems (Section II.2).

II.1 The Inter-American System

The Inter-American Court, established by the Organization of American States in 1979, is an independent judicial institution with jurisdiction over the states that are party to the *American Convention on Human Rights* (American Convention) and have accepted its jurisdiction for alleged violations of the obligations included in the convention. The Court has adjudicated on several cases involving large-scale abuses, which occurred during conflict or repression. Such cases often arrived at the Court when the state concerned had undergone or was undergoing a transition. The Inter-American Court is not a criminal court and cannot adjudicate on individual responsibility. But in a creative interpretation of its remedial powers, it regularly orders states to investigate, try, and punish those responsible for human rights violations and to provide different forms of reparation to victims.[5] The Court was, from its first contentious case, confronted with mass, state-sponsored violations of human rights, whose dynamics came to shape the Court's remedial practice.[6] The *Velasquez-Rodriguez* case, which dealt with enforced disappearances in Honduras, established new ground rules with respect to reparations that were 'manifestly transitional'.[7] The decision had an enormous impact on the processes of

[5] eg, IACtHR, *Ituango Massacres v. Colombia*, 1 July 2006, Series C, No. 148. See also, Huneeus (n 2), 2, 11; DC Baluarte, 'Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives' (2012) 27 Am Univ Intl L Rev 263; V Abramovich, 'From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System' (2009) 6 Sur Intl J Human Rights 7 (2009); C Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German LJ 1203; LJ Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 Va J Intl L 915; FF Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 Am Univ Intl L Rev 195; TM Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2001) 4(7) Stan J Intl L 279 (2011).

[6] eg, IACtHR, *El Amparo v. Venezuela*, Ser. C, No. 19, 18 January 1995. See also, Huneeus (n 2), 5; V Krsticevic, 'Reparations in the Inter-American System: A Comparative Approach' (2007) 56 Am Univ L Rev 1375; Antkowiak (n 3).

[7] IACtHR, *Velasquez-Rodriguez v. Honduras*, Ser C No. 4, 29 June 1988.

political transformation on-going in various Latin American countries.

The Inter-American Court only has jurisdiction over states that have ratified the American Convention, clearly not over companies. Arguably, however, the Court's decisions can have an indirect impact on corporate accountability and can determine effective remedies for victims when investigating states' conduct related to the regulation of business activities. In this sense, the Court has begun to refine its guidance on state obligations including the duty to regulate and supervise corporations.[8] The Court recognizes that there are instances when certain acts or omissions by private actors can be directly treated as state acts – and therefore they amount to a violation of state duties to protect people from human rights abuses and to provide victims with a meaningful remedy. This occurs when such actors are 'empowered to act in state capacity' (such as through a contract) and they act with the 'acquiescence, collaboration, support or tolerance of state agents'.[9] State responsibility can also result when there is a failure to prevent, investigate, and punish rights violations.

Most cases brought before the Inter-American system involving corporate activities concern environmental harms and indigenous communities.[10] While not relevant for transitional justice as such, they are, however, important in setting precedents, especially in relation to reparations standards for victims of human rights abuses. For example, in *Sarayaku v. Ecuador*, the Inter-American Court found that the Ecuadorian government violated the American Convention because it failed to protect and respect the Sarayaku indigenous community's right to free, prior and informed consent, as well as their community property rights and their cultural identity, when it granted oil concessions in the community's ancestral lands without consultation.[11] The Court awarded the Sarayaku people a total of $1.3 million in damages.

[8] IACtHR, *Ximenes-Lopes v Brazil*, I. No.149 (2006), 141, *Gonzales Lluy et al. v Ecuador*, No. 298 (2015). See also, C Anicama, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System. Report on the American Convention on Human Rights to inform the mandate of the Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights' (April 2008).
[9] IACtHR, Ximenes-Lopes v Brazil (n 8), 87; Gonzales Lluy et al. v Ecuador (n 8), Mapiripán Massacre v Colombia, No. 134 (2005), 162.
[10] IACtHR, *Kichwa Indigenous People of Sarayaku v Ecuador*, No. 245 (2012), *Mayagna (Sumo) Awas Tingi Community v Nicaragua*, Ser C No 79, *Kaliña and Lokono Peoples v Suriname*, No. 309, (2015), *Saramaka People v Suriname*, No. 172 (2007), *Yakye Axa Indigenous Community v Paraguay*, No. 125 (2005), *Sawhoyamaxa Indigenous Community v Paraguay*, No. 146 (2006), *Xákmok Kásek Indigenous Community v Paraguay*, No. 214 (2010). See also, A Gonza, 'Integrating Business and Human Rights in the Inter-American Human Rights System' (2016) 1 Business Human Rights J 357; TM Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter- American Court' (2013) 35 Univ Pennsylvania J Intl L 113.
[11] *Sarayaku* (n 10). See also, L Brunner and K Quintana, 'The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku' 2012 16(35) Insights.

Only a few months after the *Sarayaku* case was presented, the *State Oil Company* of Ecuador and *Compañía General de Combustibles* signed a deed of termination of the partnership contract for the exploration and exploitation of crude oil in Sarayaku lands, but with the agreement that there was 'no environmental liability'.[12]

The Inter-American Court cannot assign specific obligations to corporations through its award of remedies. As a consequence, the remedies ordered (to states), while substantial and often including full land restitution, removal of explosives, and reforestation of the affected territories, usually neglect a full consideration of the violations at issue and their connection to corporate accountability.[13] For example, Nicaragua, in compliance with the Court's order in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, suspended the logging concession on Awas Tingni community's ancestral land that had been granted to *SOLCARSA*, a Korean lumber company.[14] The ending of such contractual relationships, however, came without any obligation for corporations to pay reparations to affected communities.

In the *Kaliña and Lokono Peoples v. Suriname* judgment, the Court did not order the review and revocation of mining concessions, as requested by petitioners, only requiring that the government institute a consultation process for awarding future concessions.[15] The Court required Suriname to establish 'the necessary mechanisms to monitor and supervise the execution of the rehabilitation by the company'.[16] Even without a full development of corporations' obligations, the *Kaliña* case is significant as it represents the first time that the Court designed specific reparations to restore the indigenous territories, placing the obligation not only on the state, but 'in conjunction with the company'.[17] Alejandra Gonza, a former lawyer at the Inter-American Court, argues that this tentative first step indicates that the Court might require in the future stronger substantiation of remedies by petitioners.[18]

The Inter-American Court has also adjudicated, and ordered reparations in cases associated with business activities in the context of armed conflicts. For example, in *Santo Domingo*

[12] *Sarayaku* (n 10), 123.
[13] eg, ibid. See also, Gonza (n 10); TM Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2015) 25 Duke J Comp Intl L 1.
[14] *Mayagna (Sumo) Awas Tingni Community* (n 10).
[15] *Kaliña and Lokono Peoples* (n 10), 224, 287, 299.
[16] Ibid., 224.
[17] Ibid.
[18] Gonza (n 10), 361-64.

Massacre v. Colombia, the representatives of the victims asked the court to establish the participation of private security agents acting to supervise and protect *Occidental Petroleum* (*Oxy*)'s property, as well as the financial and arms collaboration between *Oxy* and the Colombian National Army.[19] In 2003, residents of Santo Domingo had filed a lawsuit against *Oxy* and its security contractor, *Airscan*, in US federal court under the Alien Tort Statute. The plaintiffs claimed that in 1998 *Oxy* and *Airscan*, in a bid to secure *Oxy*'s pipeline in Caño Limón, helped the Colombian Air Force (CAF) conduct an aerial bombing attack on Santo Domingo. The raid led to 17 people dead, 25 injured and the destruction of homes and properties. Plaintiffs alleged that *Oxy* and *Airscan* provided key strategic information, as well as ground and air support to the CAF in the bombing raid, and thus they were complicit in extrajudicial killings, torture, crimes against humanity and war crimes.[20] In the case before the Inter-American Court, the representatives argued that Colombia 'did not have an adequate legislative framework that truly developed the obligation to protect human rights in relation to the activities of multinational corporations on its territory' and that the contribution to the Santo Domingo massacre by *Oxy* and *Airscan* was evident.[21] The Court found, that there was 'no dispute that the armed conflict in Arauca is closely related to the revenue derived from the oil and the location of the Caño Limón-Coveñas pipeline' and that this 'resulted in the establishment of illegal armed groups since the 1980s'.[22]

A particularly relevant case in the context of transitional justice is the *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, which arose from fighting in the Colombia's Urabá region.[23] The area was 'of major geostrategic importance in the armed conflict, in particular for the illegal armed groups', who used the passage to Panama to traffic arms and drugs.[24] The public administration in the region was corrupt, 'also owing to the award of permits or the corruption of public officials by logging companies'.[25] When illegal armed groups exerted pressure on the Afro-Descendant communities, which were 'firmly established' in the region, the communities attempted 'to

[19] *Santo Domingo Massacre* (n 3), 135.
[20] In 2014, after years of proceedings, the Court of Appeals dismissed the case finding that it had insufficient ties with the United States to be heard in US courts.
[21] *Santo Domingo Massacre* (n 3), 185.
[22] Ibid., 55, 56, 59.
[23] *Afro-Descendant Communities* (n 3). See also, T van Ho, 'Is it Already Too Late for Colombia's Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives' (2016) 5 Intl Human Rights LR 60.
[24] *Afro-Descendant Communities* (n 3), 89.
[25] Ibid., 87.

maintain their autonomy'.[26] In response, armed groups threatened, murdered, and disappeared community members.[27] The case before the Inter-American Court raised several claims, including in relation to the forced displacement and allegations of illegal logging by the Colombian company *Madarién*.[28]

Legal recognition of land rights for the Afro-Descendant communities of the Cacarica River basin took a long time and, as a result, *Madarién* was able to gain government approval for logging rights on the territory claimed by the communities.[29] In 1992, government agencies granted *Madarién* several permits, which were met by complaints by the public and finally a constitutional court decision to suspend the logging activities.[30] In 1996, after the courts revoked the order allowing *Madarién* to proceed, but before the logging operations were suspended, paramilitary groups launched attacks against the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia* – FARC).[31] Communities were attacked and members of a Colombian military and paramilitary group 'told the leaders of the Afro-descendant communities that they had to evacuate'.[32] The communities, and their 3,500 members, remained displaced until 2001.[33] They alleged that *Madarién*, which continued logging in the area, unlawfully benefitted from, and was complicit in their forced displacement.[34] Clearly, the Inter-American Court could not establish whether *Madarién* was complicit in the forced displacements. The *Afro-Descendant Communities* case process, nonetheless, represented a avenue for the communities, which did allege *Madarién*'s complicity,[35] to launch their grievance against the company and against the state's actions. The Inter-American Court heard the complaint and found that the 'logging activities ignored the Law concerning the black communities' and that the state was responsible for the failure of administrative and judicial bodies to protect the communities' property rights.[36]

[26] Ibid., 85, 87, 93, 94.
[27] Ibid., 93.
[28] Ibid.
[29] Ibid., 132, 137, 347.
[30] Ibid., 132.
[31] Ibid., 91, 92, 95
[32] Ibid., 105, 108.
[33] Ibid., 111, 125.
[34] Ibid., 140, 142, 341, 378.
[35] Ibid., 341, 374.
[36] Ibid., 355-58. See also, van Ho (n 21), 69.

Another relevant case is the *Río Negro Massacres v. Guatemala*, which involves the construction of the Chixoy dam in Guatemala.[37] The dam, financed by the World Bank and the Inter-American Development Bank, was constructed in the early 1980s during the civil war in Guatemala by the state-owned *National Electricity Institute* (*INDE*). The project forcibly displaced more than 3,500 Achi Maya people. The damages caused by the project were extensive and included pollution of the rivers, loss of land, livestock, crops, fishing grounds, and religious sites. When community members from the village of Río Negro protested that the alternative land offered to them was unsuitable and the compensation inadequate, they were massacred by paramilitary civil patrols acting under army orders; over 400 people were killed.[38] The massacre took place during the height of the genocide campaign of the 1980s, and it was the subject of the National Reparations Programme as well as several domestic criminal cases against the perpetrators.[39] Eventually a case against the Guatemala government reached the Inter-American Court. In 2012, the Court found the government responsible for violations of the American Convention including freedom of movement and residence, as a result of the forced displacement of the population during the internal armed conflict and the impossibility of returning to their ancestral lands due to construction of the dam and reservoir.[40] In relation to reparations, the Court ordered Guatemala, among other things, to build basic infrastructure and services for the Río Negro community, implement a project to rescue the culture of the Maya Achi, provide medical and psychological treatment to the victims, and provide compensation for material and immaterial damages.[41]

The novel strategy of this case was that the victims worked on redress at the Inter-American and national levels simultaneously, focusing on the banks that had financed the Chixoy project. They argued that the banks, as well as the Guatemala government, knew that the dam was being constructed by a murderous regime that would be unlikely to make adequate provision for the people being displaced. In 1996, the World Bank investigated the claims and found that *INDE* had only partially compensated the community. For example, titles to alternative land

[37] IACtHR, *Rio Negro Massacres v. Guatemala* Ser C, No. 250 (2012). See also, N Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in DN Sharp (ed.), *Justice and Economic Violence in Transition* (Springer Science Business Media 2014) 109, 132.
[38] *Rio Negro Massacres* (n 35), 65-74.
[39] Ibid.
[40] Ibid., 172–82.
[41] Ibid.

were never granted, not all those eligible received land, and the land was of poor quality.[42] While it was impossible to sue the banks directly before any administrative or legal body due to immunities, the banks agreed to finance a solution by the government as a result of pressure from international and national civil society organizations.[43] In 2010, the 'Reparations Plan for Damages Suffered by the Communities Affected by the Construction of the Chixoy Dam' was signed and agreed to by all parties.[44] The plan included provisions to compensate community members up to $154.5 million for material and non-material damages and losses, construct and repair homes, and improve roads, water, and sewage systems. The government, however, did not sign the local agreement that would have made the reparation plan binding, and as a consequence this still remains to be implemented.

II.2 The African System

Cases alleging the liability of states for violations of human rights by private actors have rarely been brought before the African Commission.[45] But a recent successful case may change the trend. In June 2016, the African Commission found the government of the Democratic Republic of Congo (DRC) responsible for the 2004 massacre of over 70 people in Kilwa, in the southeast of the country, and granted an unprecedented compensation of $2.5 million to the victims and their families.[46] *Anvil Mining*, an Australian-Canadian mining company who operated a copper and silver mine near Kilwa, was publicly criticised for its role in the violations, which included providing logistical support to soldiers who indiscriminately shelled civilians, summarily executed at least 28 people and disappeared many others. The decision in *Institute for Human Rights and Development in Africa (IHRDA) and Others v. Democratic Republic of Congo* followed a 13-year legal battle for justice by the victims and their families.

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[42] Center for Political Ecology, 'Reparations and the Right to Remedy' (World Commission on Dams Briefing Paper 2000).
[43] S Herz, 'Rethinking International Financial Institution Immunities' in D Bradlow and Da Hunter (eds.), *International Financial Institutions and International Law* (Kluwer 2010), 137.
[44] Plan de Reparación de Daños y Perjuicios Sufridos por las Comunidades Afectadas por la Construcción de la Hidroeléctrica Chixoy, April 2010.
[45] In *Human Rights NGO Forum v Zimbabwe*, No. 145/02 (2006), the African Commission, for the first time, held that the state duty to protect human rights applies to protecting against abuse by all non-state actors, including corporations. See also, South African Institute for Advanced Constitutional, Public, Human Rights and International Law, 'Obligations and Extra-territorial Application in the African Regional Human Rights System' 17 February 2010, 30.
[46] *IHRDA v DRC* (n 4). Victims were notified on 7 August 2017.

On 14 October 2004, a small group of lightly armed rebels tried to take control of Kilwa. In retaliation, the Congolese army (*Forces Armées de la République Démocratique de Congo* - FARDC) bombarded the town, and searching for rebels, arbitrarily detained, tortured and killed civilians. Over two days, at least 73 civilians were killed, including an estimated 28 people who were arbitrarily arrested and then summarily executed. Others were brutally tortured, some dying from their injuries in the weeks and months that followed. A week after the events, the UN peacekeeping mission based in Congo (*Mission des Nations Unies au Congo* – MONUC) conducted an investigation and accused the FARDC of war crimes.[47]

The massacre in Kilwa was part of the second of two consecutive wars in DRC, from 1998 to 2003. The exploitation of the DRC's vast mineral wealth was an important feature in the wars. *Anvil* won the license to mine the copper and silver at Dikulushi, 50 km from Kilwa, in 1998, during the DRC's second war. It began mining operations in 2002.[48] According to the UN investigation, *Anvil* provided substantial logistical support to the military action by the FARDC in Kilwa.[49] An airplane chartered by *Anvil* was used to transport an estimated 150 troops from Pweto to Kilwa on October 14 and 15.[50] The FARDC used the company's vehicles, driven by *Anvil* employees, to transport soldiers.[51] The vehicles also transported looted goods, corpses and people arbitrarily detained by the soldiers. [52] As noted by MONUC:

> In October 2004, the Commander of the 6th military region in Lubumbashi informed MONUC that the intervention of the FARDC to bring safety back to Kilwa was made possible thanks to the logistical assistance given by Anvil Mining. On another occasion, during an interview made with an Australian television channel (ABC) on 6 June 2005, the President and CEO of Anvil Mining, M. Bill Turner, responded to a question concerning the use of Anvil Mining vehicles by saying "so what?". He acknowledged that Anvil Mining had provided logistic [*sic*] to the army, following a "request from

[47] Mission des Nations Unies au Congo (MONUC), 'Report on the conclusions of the Special Investigation concerning allegations of summary executions and other human rights violations perpetrated by the Armed Forces of the Democratic Republic of Congo (FARDC) in Kilwa (Katanga Province)', 15 October 2004.
[48] In 2010, the Dikulushi mine was sold to Mawson West, a small Australian mining company. In January 2015, Mawson West stopped industrial production at Dikulushi, stating the mine was no longer economically viable.
[49] MONUC (n 47), VI.
[50] Ibid., para 36.
[51] Ibid.
[52] Ibid.

the army of a legitimate government". He also added: "We helped the military to get to Kilwa and then we were gone. Whatever they did there, that's an internal issue"[53]

In 2006, after two years of pressure by human rights groups, a Congolese military prosecutor recommended nine soldiers and three serving and former *Anvil* employees stand trial for war crimes or complicity in war crimes.[54] In March 2007, just before the trial was due to start, the prosecutor was removed from the case and replaced by a close associate of President Kabila, who had also been an advisor to a former *Anvil* board member.[55] A few months later, all the defendants were acquitted.[56] A higher military court refused to hear the appeal against the acquittals.

Survivors and their families continued to pursue justice in Canada and Australia, where Anvil had offices. In 2005, the Australian Minister of Justice instructed the federal police to open an investigation into *Anvil's* role in the Kilwa massacre.[57] The inquiry was flawed by personnel changes: in the space of two years the case was assigned to six different officers.[58] In October 2006, just before the start of the Congolese trial, the police recommended the investigation be closed because of insufficient evidence.[59] Following the verdict in Congolese Military Court in June 2007, the Australian police ended its investigation. It brought no charges. In March 2007, human rights NGOs requested the Canadian Minister of Justice to open an investigation into the Canadian entity of *Anvil*.[60] The War Crimes Unit of the Canadian police began to investigate, but its efforts were slow and appeared to languish after a number of years. In March 2010, the Canadian Association Against Impunity, a coalition of six NGOs, filed a class action suit in Quebec, where *Anvil* had its Canadian office, in an effort to obtain justice and compensation for the victims.[61] Finally, the Court of Appeal ruled that that Quebec courts

[53] Ibid., para 37.
[54] Rights and Accountability in Development (RAID) and others, 'Kilwa Trial: a Denial of Justice – a chronology, October 2004-July 2007' 17 July 2007.
[55] UN News Centre, 'DR Congo: UN's top rights official concerned at acquittal in military trial', 4 July 2017.
[56] Ibid.
[57] Pierre v. Anvil Mining Management NL (2008), SCWA 30.
[58] RAID (n 54), 5-7.
[59] Ibid., 7-10.
[60] Ibid., 11-25.
[61] Canadian Association Against Impunity, 'Significant step forward in holding Anvil Mining to account' 29 April 2011.

did not have jurisdiction to hear the case.[62] An appeal to the Supreme Court by the victims was unsuccessful.

Following the failure to obtain justice in the DRC, Canada or Australia, the victims and the human rights groups supporting them, decided to seek justice through the African Commission. In 2010, they submitted a complaint.[63] The Commission found the Congolese government had violated nine human rights provisions of the *African Charter on Human and Peoples' Rights* (African Charter), including extrajudicial executions, torture, arbitrary arrests, disappearances and forced displacement.[64] It awarded the eight victims named in the complaint $2.5 million, the highest ever award by the African Commission.[65] The decision sets new precedents.

First, it specifies the exact sum to be paid to each individual victim - the Commission does not usually indicate the sum of compensation to be paid, but rather recommends that the State provide 'adequate compensation'. Second, the Commission's decision covers not only compensation for the direct violation the victims suffered, but also acknowledges the needs of the larger Kilwa community. It urged the DRC government to identify and compensate other victims and their families not party to the complaint who were also directly affected by the attack.[66] The Commission said the government should formally apologize to the people of Kilwa, exhume and re-bury the bodies dumped in a mass grave, construct a memorial, provide trauma counselling for those affected, and rebuild the schools, hospital and other structures destroyed during the attack.[67] These collective and restorative reparations benefit the Kilwa community as a whole and recognise the wrongs done to both the individuals and the affected community.

Third, the Commission urged the government to launch a new criminal investigation and 'take all due measures to prosecute and punish agents of the state and Anvil Mining Company staff'.[68] The Commission publicly criticised *Anvil* by stressing that extractive industry

[62] Canadian Association Against Impunity, 'No justice in Canada for Congolese massacre victims as Canada's Supreme Court dismisses leave to appeal' 1 November 2012.
[63] *IHRDA v DRC* (n 4).
[64] Ibid., para 154. The Commission found that DRC violated articles 1, 4, 5, 6, 7, 14, 22 and 26 of the African Charter.
[65] Ibid., para. 154(ii)(iii)(iv).
[66] Ibid., para 154(v).
[67] Ibid.
[68] Ibid., para 154(i).

companies are also legally required to carry out their activities with due regard to the rights of the host communities: 'At a minimum, [extractive industry companies] should avoid engaging in actions that violate the rights of communities in their zones of operation. This includes not participating in, or supporting, violations of human and peoples' rights'.[69]

Finally, the collection of evidence immediately after the attack was key in this case. The African Commission cannot directly investigate the actions of companies, but it can request the complainant to present evidence substantiating the allegations, including reports by international organizations. In this decision, the report by MONUC was key to establish the facts. The UN investigation team was able to interview eyewitnesses, speak with *Anvil*, and collect other evidence just a week after the attack, and the African Commission used this material in its criticism of the company.[70]

Despite the importance of this decision and the precedents it sets for future cases, however, remedy for victims will now depend on the willingness of the DRC government. The Commission recommended the establishment of a monitoring committee to supervise the implementation of its decision, which is another innovation.[71] But the African Charter contains no provision for enforcement of the Commission's findings and recommendations, which are not formally binding. The Commission can refer cases to the African Court on Human and Peoples' Rights, if a state is a member, but the DRC is not.[72]

Until the decision in *HRDA*, the Commission's most comprehensive decision concerning the involvement of a corporation in human rights violations was the *Social and Economic Rights Action Centre (SERAC) v. Nigeria* case.[73] The case alleged that, in the process of oil production, the Nigeria military government, through a consortium formed by the state oil company *Nigerian National Petroleum Company* and *Shell*, caused environmental contamination and health problems to the Ogoni people living in the oil areas, and thus

[69] Ibid, para 101.
[70] Ibid., para 73.
[71] Ibid., para 154(vi).
[72] As at July 2017, only eight of the 30 states Parties to the Protocol had made the declaration recognizing the competence of the Court to receive cases from NGOs and individuals.
[73] ACHPR, *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* (2001) AHRLR 60 [*SERAC v Nigeria*].

violated several rights in the African Charter.[74] It also alleged that Nigerian security forces attacked, burned and destroyed several Ogoni villages and homes in response to the Movement of the Survival of Ogoni People's campaign against the oil companies. Many Ogoni people became displaced as a result.

The *SERAC* case is significant as the African Commission affirmed the state duty under the African Charter to protect human rights against abuses perpetrated by private parties.[75] The Commission ruled that the Nigerian government violated the rights to life, to health and to clean environment, among others. The Commission also held that the state's failure to monitor oil activities and involve local communities in decisions violated the right of the Ogoni people to freely dispose of their wealth and natural resources.[76] The direct role of the Nigerian government included 'placing the legal and military powers of the State at the disposal of the oil companies'.[77] The Commission found that the Nigerian government gave 'the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis'. [78] As remedial measures the Commission recommended the provision of information to exposed communities in addition to conducting an investigation and prosecuting government and private officials for their involvement in human rights violations, cleaning the land and rivers affected and ensuring adequate compensation to victims.[79]

Some additional developments in the African System might led to further cases scrutinising the role of corporations in human rights abuses. In 2014, the African Union adopted a Protocol that, should it come into operation, would create a new international criminal law section of the African Court of Justice and Human and People's Rights[80] with jurisdiction over international and certain transnational crimes, as well as competence to hear cases against

[74] Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter.
[75] *SERAC v Nigeria* (n 73). See also, D Aguirre, 'Corporate Social Responsibility and Human Rights Law in Africa' 2005 5(2) African Human Rights LJ, 239, 263.
[76] Article 21 of the African Charter. *SERAC v Nigeria* (n 73), paras. 55-58.
[77] *SERAC v Nigeria* (n 73), para 58.
[78] Ibid.
[79] South African Institute (n 43), 32; J Oloka-Onyango 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and The Struggle for People's Rights in Africa' (2003) American Univ Intl Law Rev 852; R Murray, *The African Commission on Human and People's Rights and International Law* (Hart 2000), 37-38; E Druigbo 'Multinational Corporations and Compliance with International Regulations Relating to Petroleum Industry' (2001) Annual Survey of Intl Comp L 101, 139.
[80] The African Court of Justice and Human Rights was founded in 2004 by a merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union.

corporations.[81] Should it come into operation, the new criminal chambers of the African Court would have the potential to hear cases against corporations doing business in Africa, whether or not they are also headquartered or incorporated in states that are a party to the African Charter.[82]

In 2015, the African Commission adopted *General Comment No. 3 on the Right to Life*.[83] This is the first time that a treaty body mentions the direct responsibility of corporations operating an entirely private business without performing state-like activities.[84] Paragraph 18 reads:

> States must hold to account private individuals and corporations, including private military and security companies that are responsible for causing or contributing to arbitrary deprivations of life in the State's territory or jurisdiction. Home States also should ensure accountability for any extraterritorial violations of the right to life, including those committed or contributed to by their nationals or by businesses domiciled in their territory or jurisdiction.[85]

II.3 The European System

The European Court of Human Rights has also dealt with cases alleging the responsibility of the states in relation to activities of corporations.[86] Of some relevance to transitional justice is the case related to the operations in Colombia of the Swiss multinational company *Nestlé*. Over the last 30 years, almost 3,000 trade unionists have been murdered in Colombia, including 13 workers at *Nestlé*. In 2005, Luciano Romero, a trade unionist and former employee at *Nestlé* factory *Cicolac* was kidnapped, tortured and murdered by members of a

[81] Statute of the African Court of Justice and Human and Peoples' Rights, Annex to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 27 June 2014 (Malabo Protocol). See in particular Art. 28A (international criminal jurisdiction of the Court) and Art. 46C (corporate criminal liability).
[82] It will only come into operation where it is ratified by 15 member states. Malabo Protocol, Art. 11.
[83] ACHPR, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 18 November 2015.
[84] N Bernaz, 'Corporate Accountability in Draft General Comment on Right to Life by African Commission on Human and Peoples' Rights' 24 August 2015 <http://www.rightsasusual.com/?p=989> (accessed 5 September 2017).
[85] General Comment No. 3 (n 83), para 18.
[86] eg, ECtHR, *Guerra v Italy* (1998)1 210, 26 EHRR 357, 228, 360; *López Ostra v Spain*, (1994) 303-C (ser A) 41, 20 EHRR 277, 56, 297. See also A Clapham, 'The "Drittwirkung" of the Convention' (2004) Melbourne J Intl L 23.

paramilitary group. His murder came after a number of death threats in the context of a long-standing labour dispute between the trade union Sinaltrainal and *Cicolac*. Criminal proceedings were launched in Colombia resulting in the conviction of the direct perpetrators of the murder. In his verdict, the Colombian judge stated that *Nestlé*'s role in the crime was of particular relevance and ordered an investigation to look into the matter in more detail. But finally, the Colombian prosecution authorities failed to look into the issue. In 2012, the European Center for Constitutional and Human Rights (ECCHR) and Sinaltrainal filed a criminal complaint in Switzerland against *Nestlé* and some of its managers. The complaint alleged that *Nestlé* was complicit in the murder of Luciano Romero, for failing to take precautionary measures to prevent the crime. The prosecution rejected the claim and closed the proceedings on the basis that the crimes were statute-barred and finally the Swiss Federal Supreme Court dismissed the case in 2014. Having exhausted all domestic remedies, the ECCHR filed a complaint against Switzerland, on behalf of Luciano Romero's widow, before the European Court. In 2015, the Court dismissed this complaint, without giving explanation, exhausting all legal avenues in Europe.[87]

Conclusion

Although they are not a transitional justice mechanism as such, regional human rights courts, and in particular the Inter-American Court and the African Commission, have at times examined material related to companies when deciding on a state's violation of human rights during times of conflict or repression. These courts are only mandated to establish the responsibility of states, but their judgments provide useful elements to understand the role of business in contributing to human rights violations during conflict or under the rule of authoritarian governments. The jurisprudence of the regional systems usually seeks to describe the context in which violations took place and in doing so they also contribute to establishing facts related to corporate involvement in human rights abuses. In some cases this may lead to further investigations at the national level or to payment of reparations, but at the very least this contributes to the establishment of a more truthful and accurate picture of the facts.

Arguably, precedents set by the regional systems may become particularly relevant if a future business and human rights treaty is adopted. Although negotiations are still under way, it is

[87] ECtHR, European Center for Constitutional and Human Rights v. Switzerland (2015).

likely that such treaty will follow the classic UN treaty model: it will only bind states that have ratified it (i.e. it will not directly bind corporations). Possibly, if a UN business and human rights treaty is adopted, this will include obligations for the states that ratify it to regulate the operations of corporations headquartered in their territory and to investigate business-related human rights abuses.[88] As such, the jurisprudence being developed by the regional system may set precedent for cases that could be adjudicated under a potential future monitoring body of the business and human rights treaty.

Despite the theory that human rights systems ought to present an important avenue for victims of corporate human rights abuses when domestic remedies have failed, this chapter shows that their effectiveness is curtailed by a number of limitations. Proceedings are extremely lengthy, as the *HRDA* case demonstrates: the facts transpired in 2004; the complaint before the African Commission was filed in 2010, after a number of unsuccessful attempts in different jurisdictions; the Commission took six years to reach the decision and more than one year after that to releases the judgement and notify the parties. Now is up to the DRC government to pay reparations to victims and reopen an investigation against *Anvil*. The decisions of the regional systems have the potential to recommend national governments to implement reparations measures addressing corporate activities. Ultimately, however, the national governments have to implement those recommendations. As discussed in this chapter, to date they have done so only to a limited extend. Currently, the most effective avenue to seek remedy for corporate human rights abuses, including in transitional contexts, is litigation at the national level, which the next chapter analyses.

[88] N Bernaz and I Pietropaoli, 'The role of NGOs in the business and human rights treaty negotiations' (2017) Oxford J Human Rights Practice 1; International Commission of Jurists (ICJ), 'Need and Options for a New International Instrument in the Field of Business and Human Rights' (June 2014).

III. DOMESTIC CRIMINAL AND CIVIL LIABILITY

Introduction

The previous two chapters have assessed the potential and limitation of international criminal tribunals and regional human rights systems to provide remedies in cases of corporate human rights abuses. This chapter moves to the analysis of domestic jurisdictions, which currently afford the only viable option to directly prosecute corporations for human rights violations and provide reparations to victims. Enjoying legal personality under domestic law, corporations are subject not only to the national regulations but also to the international obligations incorporated into domestic law, among which are those of international human rights law and international criminal law.[1] This has led to a dynamic development of law - a search for how different branches of national law can be adapted to hold business enterprises accountable for violations of human rights and international criminal law norms.[2] These types of judicial processes are not specifically transitional justice mechanisms, but they have provided, at times, the only opportunity for remedies to victims of corporate-related abuses in a transitional justice context. The Guiding Principles recognises:

> Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.[3]

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[1] R Bismuth, 'Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing Between International and Domestic Legal Orders' (2009/2010) 38 Denver J Intl L Policy 203, 205.

[2] International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crime* (International Commission of Jurists 16 Sep 2008), vol. 1, 2; PC Zumbasen, 'Transnational Legal Pluralism' (2010) 10(2) Transnational Legal Theory 141.

[3] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, annexed to Report of the Special Representative of the Secretary-General on the issue of

The integration of international obligations in domestic legal orders has created two channels of liability of corporations: criminal and civil. Actually, establishing a strict distinction between the two remains a questionable point. In both cases, the liability of the corporations is sought for the same violations and stems from similar international obligations and similar standards of corporate complicity are used. The enforceability comes directly from international norms, through national laws. But while the distinction between civil and criminal liability of corporations is blurred from a substantive perspective, the two channels of liability are procedurally different and present distinct challenges, which the next session seeks to analyse.[4]

This chapter starts with the analysis of corporate criminal liability in transitional justice contexts (Section III.1) and then turns to the issue of civil liability (Section III.2) looking in particular at cases under the Unites States' Alien Tort Statute. Cases are selected on the basis of their relevance in transitional justice contexts – in other words, all the cases selected concern alleged corporate abuses that occurred in a country in conflict or that was governed by a repressive regime. Examples of cases discussed here are the ones against *Unocal*, *Talisman Energy*, *ExxonMobil*, and *Chiquita*, where complicity in gross human rights violations was levelled against the corporations in Myanmar, Sudan, Indonesia, and Colombia respectively. The *South Africa Apartheid Reparation* litigation is another key lawsuit discussed in Section III.2. This chapter engages in an analysis of the normative, economic and practical obstacles to achieving corporate accountability and reparations for victims through domestic litigation in a transitional justice context.

III.1 Criminal liability

There are three potential venues at the domestic level for prosecuting companies or executives alleged to have committed, or been complicit in, human rights violations or international crimes: the 'host' state on whose territory the crimes were committed; the 'home' state in whose territory the executive lives or the corporation is legally domiciled (through the use of extraterritorial jurisdiction); or any state exercising universal jurisdiction over the crimes

Human Rights and Transnational Corporations and Business Enterprises, John Ruggie, A/HRC/17/31 (21 March 2011) [Guiding Principles], principle 23, commentary.

[4] Bismuth (n 1), 218.

considered to be of concern to the entire international community. Proceedings may be directed against corporations or against individual corporate officers.

The Prosecution of Corporations

Corporate criminal liability was common in continental Europe in the 17th and 18th centuries and was reflected in great detail, for example, in the French Criminal Code of 1670.[5] The concept fell into disfavour after the French Revolution however, when corporate-style associations were disbanded and individualism dominated. [6] There are two key problems with the criminal liability of corporations from a theoretical legal perspective. First, the existence of a moral dimension of corporations - and therefore the existence of the *mens rea* in the commission of a criminal act.[7] 'Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like', said Edward Thurlow, first Baron Thurlow in the 18th century.[8] It is difficult for some to conceptualise the moral culpability of companies and the nature of any punishment they may receive.[9] Second, the consideration of corporate criminal liability as a form of 'collective punishment' and therefore incompatible with criminal law. Criminal law has traditionally focused on individual, rather than collective, guilt.[10] There has been an understandable reluctance to impose on a group what might be seen as collective punishment for the wrongdoing of an individual.[11] The concern is also that sanctioning the corporation could in some cases unjustly hurt its stakeholders (shareholders, employees, etc.), who would pay an unjust price for past actions of the corporation. Theoretical arguments on the merits of corporate guilt are outside the remit of this research, as is a comparative assessment of how the concept of corporate criminality is realized, or not, in

[5] G Stessens, 'Corporate Criminal Liability: A Comparative Perspective' (1994) 43 Intl Comp LQ 493, 494.
[6] Ibid.
[7] S Neumann Vu, 'Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent' (2004) 104 Columbia LR 459.
[8] Edward, First Baron Thurlow, Oxford Dictionary of Quotation (OUP 1989) 550:32.
[9] AW Altschuller, 'Two Ways to Think about the Punishment of Corporations' (2009) 46 American Criminal L Rev 1359; J Clough and C Mulhern, *The Prosecution of Corporations* (OUP 2002), 4-5; KF Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (1982) 60 Wash Univ LQ 393; VS Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 Harv L Rev 1477, 1479-81; J Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) J Business L 3. See also *United States v. Sam*, 141 F.3d 463, 474 (3d Cir. 1998) reviewing nature of a corporation as separate legal entity, capable of suing and of being sued.
[10] M Pieth and R Ivory, Corporate Criminal Liability: Emergence, Convergence and Risk, Ius Gentium: Comparative Perspectives on Law and Justice (Springer 2011), 4.
[11] J Hasnas, 'The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability' (2009) 46 American Criminal LR 1329.

different jurisdictions.[12] What is important is that most countries now permit corporations to be prosecuted for criminal offences.[13]

Today, the principle of corporate criminal liability is typically recognised in common law countries, and is increasingly accepted in civil law systems - Australia, Canada, the United States, Japan, the United Kingdom and many countries in Europe, led by the Netherlands in the 1920s.[14] These countries consider that a corporation is an entity that can exercise autonomous will, and commit a crime, distinct from the individual intentions of its directors, representatives and employees, and therefore can be held criminally accountable.[15] The Council of Europe gave additional impetus to this movement in 1988, when it recommended that member states adapt their laws to permit corporate criminal prosecutions.[16] Across jurisdictions, however, different corporate criminal liability laws apply and the field is continuing to develop unevenly under different legal orders.[17]

Importantly from a transitional justice perspective, an increasing number of states have incorporated international criminal law into their domestic criminal legislation.[18] States parties of the Rome Statute have amended their domestic criminal laws to include international crimes among those that may be prosecuted in national courts.[19] Consequently, there is a basis

[12] Pieth and Ivory (n 10); Hasnas (n 11); Altschuler (n 9); Fafo, *Business and International Crimes. Assessing the Liability of Business Entities for Grave Violations of International Law* (Fafo 2005); J Kyriakakis, 'Corporate Criminal Liability and the ICC Statute. The Comparative Law Challenge' (2006) 56(3) Netherlands Intl LR, 340.
[13] The United States, Canada, Australia, Japan and a number of EU countries (Austria, Belgium, Denmark, Estonia, Finland, France, Ireland, Norway, the Netherlands, Poland, Portugal, Romania, the United Kingdom, Luxembourg and Spain, but notably not Germany).
[14] Fafo (n 12); Kyriakakis 'Corporate Criminal Liability and the ICC Statute' (n 12), 342; International Commission of Jurists (n 2), 31–32; H de Doelder and K Tiedemann (eds.), *Criminal Liability of Corporations* (Brill 1996); C Wells, *Corporations and Criminal Responsibility* (OUP 1993); LH Leigh, 'The Criminal Liability of Corporations and Other Groups: A Comparative View' (1982) 80 Mich L Rev 1508 (1982); Stessens (n 5).
[15] M Krcmnitzer and H Gcnaim, 'The Criminal Liability of a Corporation' in A Barak (ed.) *Shamgar Rook* (Israel Bar Association 2003), 33, 67-68; R Slye, 'Corporations, Veils and International Criminal Liability' (2008) 33 Brooklyn J Intl L 955, 960-61; S Beale and A Safwat, 'What Developments in Western Europe Tell Us about American Critique of Corporate Criminal Liability' (2005) 8 Buffalo Criminal L Rev 89, 110-15; M Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law' (2010) 8(3) J Intl Criminal Justice 913.
[16] Council of Europe, Recommendation No. R(88)18. Vol. 20:45 20.
[17] International Commission of Jurists (n 2), vol II, 57; Bismuth (n 1), 203.
[18] For example, Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, Slovenia, South Korea, South Africa, UK, and US have introduced legislation that extends domestic legislation on international crimes to legal persons. See, Max Planck Institute, National Prosecution of International Crimes <www.mpicc.de/ww/en/pub/forschung/forschungsarbeit/strafrecht/nationale_strafverfolgung.htm> (accessed 6 September 2017).
[19] A Ramasastry and RC Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law (Fafo 2006).

for finding companies liable for international crimes within most domestic legal systems.[20] As David Scheffer, the diplomat at the Rome Conference who led the US delegation, underlined: 'Rather than witnessing a retreat from corporate liability in international practice since 1998, there has been a marked progression towards adoption of corporate criminal liability among nations joining the International Criminal Court'.[21]

Anita Ramasastry and Robert Thompson argue that 'since most of the countries that have incorporated [international criminal law] into their domestic statutes also do not make a distinction between natural and legal persons…, these jurisdictions include corporations and other legal persons in their web of liability'.[22] Arguably, the growing recognition of the criminal liability of corporations in national legal orders, added to the domestic incorporation of international crimes, can be a vehicle for liability of corporations for violations of international criminal law.[23]

Further, the jurisdiction of the ICC is limited *ratione personae* not only to individuals, but also by provisions stipulating that persons covered by the ICC jurisdiction must either be nationals of a state party to the Rome Statute, or must have perpetrated their criminal conduct on the territory of a state party. Domestic criminal legislation does not include such limitations and makes possible, under certain conditions, the prosecution of a legal person of any nationality and even for a conduct occurring abroad.[24] Cory Wanless argues that the extended jurisdictional basis of domestic laws may 'fill the impunity gap left by the ICC's focused jurisdictional approach [and] we should expect national courts to cast a wider prosecutorial net than the ICC'.[25] Prosecutions at the national level may become increasingly possible as more

[20] A Batesmith, 'Corporate Criminal Responsibility for War Crimes and Other Violations of International Humanitarian Law: The Impact of the Business and Human Rights Movement' in C Harvey, J Summers and N White (eds.), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014), 296.
[21] Ambassador DJ Sheffer, *Amicus Curiae* in support of the petitioners in *Joseph Jesner et al v. Arab Bank, Plc*, 26 June 2017, 19.
[22] Ramasastry and Thompson (n 19), 15.
[23] In addition, some international treaties on financial, economic and transnational crimes require states which are party to introduce criminal liability of legal persons into domestic law. See in particular Article 10 of the UN Convention against Transnational Organized Crime, which calls for legal persons to be subject to civil, administrative or criminal sanctions.
[24] Bismuth (n 1), 219- 22
[25] WC Wanless, 'Corporate Liability for International Crimes under Canada's Crimes Against Humanity and War Crimes Act' (2009) 7(1) JICJ, 201, 205-06. Ruggie also observed, in 2008, an 'expanding web of potential corporate liability for international crimes.' Special Representative of the UN Secretary-General on the Issue of

states incorporate all or some aspects of gross human rights abuses amounting to crimes under international law into their domestic laws.[26]

While prosecution in the 'host' state where the abuses have been committed is in theory the most effective - as victims, evidence and witnesses are located there - in a transitional justice context the reality of most countries emerging from conflict or repression makes it difficult to pursue. Indeed, the majority of cases dealing with the responsibility of companies for human rights violations have been litigated in a different country from the place where the violations have occurred, usually invoking the home state's use of its extraterritorial jurisdiction. An obligation relying on the home state, however, requires an extraterritorial application of the international instrument containing such obligation, which is not yet a settled debate in international law. There is an immense body of national, regional and international frameworks and case law, decisions of UN Committees, and scholarship regarding the applicability of human rights beyond borders.[27] Several international bodies have also been encouraging states to take extraterritorial measures to exercise control over the overseas activities of companies registered in their territories.[28] For example, the Committee on

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Human Rights and Transnational Corporations and Other Business Enterprises, Protect, respect and remedy: A framework for business and human rights, U.N. Doc. A/HRC/8/5, 7 April 2008, 20.

[26] International Commission of Jurists (n 2), vol II, 8.

[27] eg, Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The right to the highest attainable standard of health, UN Doc E/C.12/2000/4, para 39 (11 August 2000); General Comment 15 on the right to water, UN Doc. E/C.12/2002/1 para 31 (January 2003); Committee on the Rights of the Child, General Comment 16 on State obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/ GC/16, paras 43 and 44 (April 2013); Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/GC/28 para 36 (December 2010). See also, SL Seck, 'Home State Responsibility and Local Communities: The Case of Global Mining' (2008) 11 Yale Hum Rts Dev LJ 177; W Vandenhole, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development' (2009) 17 Intl J Children Rts 23 (2009); R McCorquodale and P Simons, 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law' (2007) 70 Modern L Rev 618; DM Chirwa, 'The Doctrine Of State Responsibility As a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 Melb J Intl L 1, 4-5, 36.

[28] For example, the Committee on Economic, Social and Cultural Rights affirms that states parties should, prevent third parties from violating the rights protected under the Covenant in other countries, if they are able to influence these third parties. CESCR, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the Covenant), E/C.12/2000/4, 11 August 2000, para 39, General Comment No. 15 (2003), The right to water (arts. 11 and 12 of the Covenant), E/C.12/2002/11, 20 Jan 2003, para 33 which reads: 'Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.' In regard to corporations, the Committee has stated that States parties should 'take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction', CESCR, Statement on the Obligations of States Parties regarding the corporate sector and economic, social and cultural rights. The Committee on the Elimination of Racial Discrimination has also called upon States to regulate the extraterritorial actions of third parties registered in their territory. For example, Concluding observations of the Committee on the Elimination of Racial Discrimination,

Economic, Social and Cultural Rights has repeatedly emphasized that states parties 'are required to take the necessary steps to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction'.[29] Victims of corporate human rights abuses have increasingly turned to courts using extraterritorial criminal or civil jurisdiction to hold companies responsible for such abuses accountable and to seek remedies and reparations.[30] At times the use of extraterritorial jurisdiction is presented as a 'magic potion' to address the challenges of corporate accountability, and in particular in its use of transnational civil litigation. [31]

The use of extraterritorial jurisdiction for corporate criminal liability is important in a post-conflict transitional context as victims in the host country may be unable to seek redress, the courts may be unable or ill-equipped to handle their cases or the host government may not pursue enforcement against the perpetrators.[32] But extraterritorial application of these pieces of domestic criminal legislation varies from country to country, and some national judicial systems do not have jurisdiction over crimes committed by their companies in other countries.[33] This often means impunity for companies when they are involved in criminal activity abroad and lack of reparations for victims. Amnesty International and the International Corporate Accountability Roundtable have documented over 20 examples where authorities

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Canada, CERD/C/CAN/CO/18, 25 May 2007, para. 17; CERD/C/CAN/CO/19-20, 9 March 2012, para. 14; CERD/C/GBR/CO/18-20, 14 Sep. 2011, para. 29. The first example of the affirmation by an international body encouraging states to ensure that companies registered on their territories do not violate, while operating overseas, human rights contained in the UDHR is a 1970 resolution by the Security Council. In relation of the South African occupation of Namibia, the resolution called 'upon all states to discourage their nationals or companies of their nationalities not under direct governmental control from investing or obtaining concessions in Namibia…' UN SC Res 283, 29 July 1970 Situation in Namibia para. 7. In 1972, in the context of the strike of African contract workers, the Security Council adopted a resolution in which it called 'upon all states whose nationals and corporations are operating in Namibia… to use all available means to ensure that such nationals and corporations conform in their policies of hiring Namibian workers, to the basic provisions of the UDHR.' UN SC Res 310, 4 Feb 1972, Situation in Namibia, para. 5. Report by the Secretary-General on the Implementation of Security Council Resolution 301 (1972), S/10752, 31 July 1972, p. 14.

[29] CESCR, Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1, paras. 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 E/C.12/GC/2, 23 June 2017, paras 25-28.

[30] IPIS, *The Adverse Human Rights Risks and Impacts of European Companies: Getting a glimpse of the pictures* (2014).

[31] B Stephens, *Corporate Accountability: International Human Rights Litigation against Corporations in US Courts* (Martinus Nijhoff Publishers 2008); PI Blumberg, 'Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems' (2002) 50 American J Comp L 493.

[32] A Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon. An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 Berkeley J Intl L 91, 92.

[33] W Kaleck and M Saage-Maab, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes' (2010) 8 J Intl Criminal Justice 699, 714- 15.

have not prosecuted multinational companies, despite being provided with evidence of illegal conduct linked to serious human rights abuses in other countries.[34] Many of the documented cases implicate Western companies in serious human rights abuses in fragile or war-torn areas. For example, as discussed in Chapter II, no national government did an adequate investigation into the involvement of Australian-Canadian *Anvil Mining* in the DRC's Kilwa massacre.[35]

Some criminal complaints against companies have, however, been filed on the basis of extraterritorial jurisdiction. In particular, French authorities have opened investigations into at least four cases involving French companies accused of complicity of torture with Gaddafi's regime in Libya and Assad's in Syria. These cases are all at an initial stage and no corporation has been charged yet. Thus, while an assessment of the success of the cases from a victim point of view is not yet possible, the mere starting of the proceedings are significant. 'As the notion of corporate criminal liability for international crimes is still at its infancy in international law' Nadia Bernaz argues, 'these domestic cases are of paramount importance'[36] in the area of corporate accountability and remedy.

The first of such complaints was filed in 2011 against *Amesys*, a French company subsidiary of the *Bull* group.[37] The complaint alleged that in 2007 *Amesys* had entered into an agreement with the Libyan government to provide and assist with the development of a communication surveillance network, which the authorities used to intercept private Internet communications and to identify opponents of Gaddafi - then detained and tortured. FIDH and the *Ligue française des droits de l'Homme*, two NGOs, lodged the complaint in France on the basis of the principle of extraterritorial jurisdiction, alleging the complicity of *Amesys* and its executive managers in acts of torture. The application of the UN *Convention against Torture*, and the principle of extraterritorial jurisdiction enshrined therein, gives French judges jurisdiction over crimes committed outside of France, regardless of the nationality of the perpetrator or the victim.[38] In this instance, however, the fact that *Amesys* had its headquarters in France at the time that the alleged crimes were perpetrated was enough to give the French courts jurisdiction

[34] Amnesty International and International Corporate Accountability Roundtable, 'Corporate Human Rights Principles', 2016 <http://www.commercecrimehumanrights.org/> (accessed 7 September 2017).
[35] See Chapter II.2.
[36] N Bernaz, 'Complicty of War Crimes: Criminal Complaint against a French Technology Company' 30 June 2016 <http://rightsasusual.com/?p=1057> (accessed 7 September 2017).
[37] FIDH, *The Amesys Case* (FIDH 2013).
[38] Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, ratified by France on 18 February 1986.

over acts of torture committed outside France where the main perpetrators were non-French nationals - namely, agents of the Libyan state.[39] The opening of a criminal investigation was met with opposition from the Prosecutor of the Paris Tribunal, who asked that the case be closed. In 2013, the Criminal Investigations Tribunal of the Paris Appeals Court denied the Prosecutor's request, thus confirming the opening of an investigation.[40] The case in on-going.

A second similar complaint was filed in 2012 by two NGOs, which urged the French courts to investigate the complicity of French companies in human rights violations in Syria. The complaint alleged that *Qosmos*, a French software company, provided the Bashar El-Assad government with surveillance equipment, which was used to monitor and target dissidents later arrested and tortured.[41] Like in the *Amesys* case, the French courts asserted their jurisdiction based on *Qosmos*'s being headquartered in France. In April 2015, the investigative judge declared *Qosmos* an 'assisted witness', which means that there was evidence showing it was plausible that the company could have taken part in the commission of the offences.[42] This case is also on-going.

The complaint against French company *Exxelia Technologies*, an electronic manufacturer, is the third of its kind in France. In June 2016, a Palestinian family, with the support of *Action Des Chrétiens Pour L'abolition De La Torture* (ACAT) and represented by the law firm *Ancile-avocats*, filed a criminal complaint against *Exxelia*.[43] They claim that the company is guilty of manslaughter and possibly complicit in a war crime. In July 2014, a missile, probably dropped from a drone, landed on the Palestinian family house's roof where several children were feeding birds. A little girl and two boys were killed in the attack. Two other children were severely injured. As the house was not a legitimate military target, the attack may constitute a war crime. A component with the mark '*Eurofarad France*' was found in the debris. Experts have since determined that it is an effect sensor made by *Exxelia*. The core of the complaint is that the company sold the component to the Israeli government with

[39] FIDH, *The Amesys Case* (n 37).
[40] Ibid.
[41] FIDH, 'France: Opening of a judicial investigation targeting Qosmos for complicity in acts of torture in Syria', 4 November 2014.
[42] FIDH, 'Designation of Qosmos as "assisted witness" constitutes an important step forward in case underway', 20 April 2015.
[43] Middle East Monitor, 'Palestinian family sues French technology company for complicity in war crimes' 30 June 2016.

knowledge that it would be part of a missile and that it was susceptible to be used to commit a war crime. *Exxelia* has not been charged yet.

Finally, in November 2016, Sherpa and the European Center for Constitutional and Human Rights, two NGOs, filed a criminal complaint against French-Swiss company *LafargeHolcim*, the world's largest cement producer, accusing the company of complicity in war crimes in Syria. At issue is the activity of *Lafarge* before merging with *Holcim*, in 2015. In 2010, *Lafarge* had built a cement factory of 240 workers near Kobane, a northern Syria town. Operations there continued until 2014, long after the violence began in 2011. While fighting among Syrian rebels, the Syrian army and the terrorist group Islamic State (IS) drove other foreign companies out of the country, the plant operated by *Lafarge* was 'curiously' able to operate from its opening in 2010 through to 2014.[44] The criminal complaint alleged that *Lafarge* paid, via third parties, local armed groups, including IS, to keep the plant open, despite sanctions by the UN on the terrorist group.[45] France's economy ministry also filed a complaint with prosecutors over possible violations of international sanctions.[46] Legal proceedings in this case too are on-going.

France is not alone in attempting the use of extraterritorial jurisdiction to prosecute companies for crimes under international law. For example, in the Netherlands, a criminal case was filed against *Riwal Group*, a Dutch company that rents out construction equipment, concerning its involvement in the Occupied Palestinian Territory (OPT). In 2006, *Riwal* rented mobile cranes and aerial platforms for use in construction of the Wall around West Bank villages in the OPT. A criminal complaint was submitted to the Dutch public prosecutor alleging that *Riwal* was complicit in the commission of war crimes and crimes against humanity in relation to the construction of the Wall and illegal settlements in the occupied West Bank. *Riwal* was also accused of complicity in the crimes of persecution and apartheid, and of being responsible for acts that were part of widespread and systematic violations of international law committed by Israel against civilian population. The *International Crimes Act* in the Netherlands prohibits the commission of war crimes and crimes against humanity by Dutch nationals, including

[44] EECHR, 'Case Report. Lafarge in Syria: accusation of complicity in war crimes and crimes against humanity', November 2016.
[45] Ibid.
[46] Ibid.; The New York Times, 'Lafarge scandal points to difficulty in business in war zone' 4 April 2017.

companies.[47] Acts that amount to complicity in crimes, such as the facilitation or the aiding or abetting of crimes are also criminalized. In 2013, after three years of investigations, the Dutch Public Prosecutor dismissed the case - *Riwal*'s contribution against the entire settlement enterprise including the Wall was deemed as minor.[48] The Dutch prosecutor was not able to obtain the necessary evidence for a conviction, much of which was located in the OPT and Israel, as their collection required cooperation from the relevant authorities.[49]

Despite the dismissal of the case, company executives came under legal and political scrutiny. The publicity and public pressure surrounding the case meant that *Riwal* took steps to disassociate itself from its subsidiary and its operations in the OPT.[50] Similarly, in March 2017, after an internal independent inquiry into possible dealings with armed groups, the *LafargeHolcim* board said the investigation had found that measures taken by staff had been 'unacceptable' and described 'significant errors of judgment'.[51] In response to the criminal complaint coupled with mounting pressure in the press, *LafargeHolcim* conducted an internal investigation and in March 2017 issued a statement accepting that it had indirectly funded illegal armed groups in Syria in order to continue its operations there and allow safe passage for staff.[52] In April, the company announced that its chief executive, Eric Olsen, would resign.[53]

Universal Jurisdiction

Under the principle of universal jurisdiction, any state has the authority to investigate, prosecute and punish certain serious crimes under international law, regardless of the location in which crimes are committed and the nationality of perpetrators or victims of crimes. [54] In the absence of any connection to the prosecuting state, universal jurisdiction is asserted over

[47] International Crimes Act 2003, article 2(2). See also, International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations. The Netherlands* (ICJ 2010), 7.
[48] International Commission of Jurists, *Corporate Complicity in International Crime* (n 2).
[49] Ibid.
[50] Al-Haq, 'Prosecutor dismisses war crimes against Riwal' 14 May 2013.
[51] The Economist, 'A giant cemenet firmmay have unwittingly funded Islamic State' 29 April 2017.
[52] LafargeHolcim, 'Lafarge responds to Syria Review' 3 February 2017 <http://www.lafargeholcim.com/LafargeHolcim-responds-syria-review> (accessed 7 September 2017).
[53] Ibid.
[54] International Court of Justice, Arrest Warrant Case (*Congo v. Belgium*), Case No. 121, 14 February 2002. See also, A Addis, 'Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction' (2009) 31 HRQ 129; J Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere From Six Regulatory Areas', Working Paper 59 of the Corporate Social Responsibility Initiative, June 2010.

'the most serious crimes of concern to the international community'.[55] The source of this jurisdiction lies in the nature of the crimes, so serious that is universally condemned, and the international community as a whole is said to be concerned. In such instances, no connection is needed between the prosecuting state and the perpetrator. These crimes include war crimes, crimes against humanity, enforced disappearance, slavery genocide, and torture. Several international conventions provide for universal jurisdiction.[56] National legislation enabling the exercise of universal jurisdiction for international crimes exists in a number of both common and civil law countries, including Australia, Canada, the Netherlands and the United Kingdom.[57]

The principle of universal jurisdiction creates a possibility for victims of serious violations of human rights or international crimes committed by companies to lodge a complaint in any state invested with such jurisdiction. In 2001, William Schabas argued that possibly the lacunae related to the liability of corporations under international criminal law may be partially corrected by national legal systems exercising universal jurisdiction: 'those that allow for corporate criminal liability will be in a position to prosecute, as they would prosecute individuals'.[58] While there are no conceptual obstacles to the exercise of universal jurisdiction to prosecute corporations involved in serious international crimes, to date only one case has been pursued.

In 2002, four Myanmar refugees in Belgium filed a lawsuit in Brussels against *Total*, the chairman and the former director of *Total*'s Myanmar operations over human rights abuses linked to the operation of the Yadana pipeline.[59] The Myanmar refugees brought the lawsuit pursuant to a 1993 Belgian law on universal jurisdiction. This case was the first to be brought under this law against a company rather than an individual. The plaintiffs alleged that *Total* and its managers were complicit in crimes against humanity, such as torture and forced labour,

[55] Rome Statute of the International Criminal Court, Preamble,. For a list of examples of domestic prosecutions using universal jurisdiction, see J Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity' (2009) 20 Criminal L Forum 1.
[56] For example, the four Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, and the International Convention for the Protection of All Persons against Enforced Disappearances.
[57] International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), vol II, 53.
[58] W Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (2001) 83(842) RICR 439, 454.
[59] Actions Birmanie, 'Civil action for Crimes against humanity and complicity in Crimes against humanity committed in Burma (Myanmar) lodged on 25 April 2002 in the Brussels magistrates court against X, the company Totalfinaelf S.A., Thierry Desmarest and Herve Madeo, (2007).

committed by the Myanmar military junta in the course of the construction and operation of the pipeline. The plaintiffs alleged that *Total* provided moral and financial support to the Myanmar military government with knowledge that its support resulted in human rights abuses. A procedural issue arose as to whether the plaintiffs had standing to bring the lawsuit under the law of universal jurisdiction because they were not Belgian citizens. Following a number of procedural hurdles, the case was closed in 2008, without the merits of the allegations being addressed.[60] *Total* is the only example of attempt to using universal jurisdiction to prosecute companies for crimes under international law.

The criminal prosecution of corporations for crimes under international law is an avenue, still at an early stage of development, that could potentially become more relevant for victims. If the cases opened in France are successful the judgements may provide important precedents and standards that may be replicated in other countries, especially in other European countries with similar criminal provisions. At the moment though, no corporation on its own right has been yet found criminally responsible by a national court for crimes under international law.

The Prosecution of Businesspeople

In addition to corporations, individual businesspeople have also been prosecuted over allegations to have committed, or been complicit in, crimes under international criminal law both at 'home' and abroad.[61] For example, Frans van Anraat is a Dutch businessman who was accused of complicity in war crimes and genocide for having sold chemicals used in the fabrication of mustard gas, with knowledge of what the chemicals would be used for, to the Iraqi government under Saddam Hussein's rule. The gas, made with the chemicals that Van Anraat sold, was later used in the massacres of Kurdish minorities in the Kurdish-Iraqi town of Halabja and in Iran in 1988 in the context of the Iran-Iraq war.[62] In 2005, the District Court of The Hague found van Anraat guilty for aiding and abetting war crimes and sentenced him to

[60] For a summary of the case see Business & Human Rights Resource Centre, Total lawsuit in Belgium (re Myanmar) <http://business-humanrights.org/en/total-lawsuit-in-belgium-re-myanmar> (accessed 7 September 2017).

[61] International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), vol II, 53. Kaleck and Saage-Maab (n 33), 716; W Huisman and E van Sliedregt, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' (2010) 8 J Intl Criminal Justice 803; Kremnitzer (n 15), 911; H Vest, 'Business leaders and the modes of individual criminal responsibility under intl law' (2010) 8 J Intl Criminal Justice, 851, 853; Wells (n 14); TL van Ho, 'Transnational Civil and Criminal Litigation' in S Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013), 55.

[62] District Court of The Hague, 23 December 2005, Case No. AX6406 [*van Anraat* case].

15 years in prison, a sentence that was increased to 17 years by the Appeals Court in 2007.[63] The court found that he was aware that his product could be used for producing poison gas and that there was a reasonable chance it would be used for chemical attacks. The court found that Van Anraat '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'.[64]

The Dutch Supreme Court upheld Van Anraat's conviction for being an accessory to war crimes.[65] It found that the accused knew that the chemicals he was supplying to the Hussein regime were being used for the production of poisonous gas and, in the context of a longstanding war in which this gas was being used in the attacks, Van Anraat's conduct constituted 'deliberate contribution' to the offences. In other words, he was found to have provided the opportunity and the means for the gas attacks.[66] He was, however, acquitted from the charges of complicity in genocide because there was insufficient evidence that he had known of the Iraqi regime's genocide intent towards the Kurdish minorities.[67]

Guus Kouwenhoven is another Dutch businessman accused of complicity in war crimes. Kouwenhoven was the director of *Firestone and Oriental* and *Royal Timber*, two major timber companies in Liberia, and it was alleged that he supplied the former President of Liberia Charles Taylor's forces with weapons and illegally traded in timber to finance Taylor's conflicts in Liberia and Sierra Leone.[68] *Oriental Timber* gained trading concessions from Taylor at a time when conflict between rival militia spilled over to Sierra Leone.[69] The Dutch prosecution indicted Kouwenhoven with aiding and abetting war crimes committed by Liberian militias and with the violation of an UN arms embargo. According to the prosecution: 'the militias hired by the former timber companies belonging to this Dutchman, are accused of participating in the massacre of civilians…Guus Kouwenhoven is accused of having supplied

[63] Ibid. See also, M Zwanenburg and G den Dekker, 'Prosecutor v. Frans van Anraat, case No. 07/10742' (2011) 104 AJIL 86; R van Rossum, 'Adjudication of Intl. Crime in the Netherlands' (2011) 39 Intl J Legal Information 202; Huisman and van Sliedregt (n 61), 805, 807.
[64] *van Anraat* case (n 62), para 17.
[65] *van Anraat* case (n 62), Dutch Supreme Court, 30 June 2009, Case No. BG4822.
[66] Ibid., Court of Appeal of The Hague, 9 May 2007, Case No. BA6734, para 12.5.
[67] Ibid., para. 17. See also, Huisman and van Sliedregt (n 61), 808- 809; H van der Wilt, 'Genocide v. War Crimes in the Van Anraat appeal' (2008) 6 J Intl Criminal Justice 557, 558-559; New York Times, 'Vendor Tied to Gas Attack Is Convicted' 24 December 2005, A5; New York Times, 'World Briefing Europe: The Netherlands: Stiffer Sentence for Iraq Poison Gas', 10 May 2007, A14.
[68] Huisman and van Sliedregt (n 61), 810 -12
[69] Guardian, 'Dutch rms trafficker to Liberia given war crimes conviction' 22 April 2017.

the arms to the militias to enable them to carry out these crimes'.[70]

In 2006, Kouwenhoven was acquitted by the District Court of The Hague of the complicity in war crimes charges due to lack of evidence, but convicted for illegal arms supplies to Taylor.[71] The conviction was overturned by the Court of Appeal, which acquitted Kouwenhoven of all charges.[72] In 2010, the Supreme Court quashed the judgment of the Appeal Court and ordered a re-trial.[73] In April 2017, the Appeal Court convicted Kouwenhoven as an accessory of war crimes and arms trafficking and sentenced him to 19 years in prison. *Global Witness*, a campaign group that gathered evidence against *Oriental Timber* cited by the Dutch prosecutors, said that the case is 'the first war crimes conviction for a businessman profiting from conflict resources'.[74] The court found that shipments for Kouwenhoven's timber operation in Liberia carried caches of hidden weapons, used by Taylor in an armed conflict with rebels where 'countless civilians' died.[75] Kouwenhoven's conviction, the Dutch judges said in a written summary of their ruling, will serve as an example to others that do business with repressive governments 'that they can thereby become involved in serious war crimes'.[76] Both cases were centred on theories of indirect perpetration as a mechanism to establish criminal responsibility and were able to proceed with the use of extraterritorial jurisdiction.

The cases discussed above involve the use of extraterritorial jurisdiction to prosecute corporations in their home state for crimes allegedly committed abroad. Argentina offers a rare example of a country that after the transition has used its national laws to prosecute businesspeople responsible for human rights violations. A number of criminal prosecutions in Argentina have been directed against businessmen for their role in the abuses committed by the military junta between 1976 and 1983. Organized labour was one of the main targets of the repression. The report of the National Commission on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición de Personas* - CONADEP) found that almost half of the disappeared were part of the country's organized labour force.[77] For example, the

[70] District Court of The Hague, 7 June 2006, Case No. AY5160, Rechtbank's-Gravenhage, 09/750001-05.
[71] Ibid. See also, Huisman and van Sliedregt (n 61) 811.
[72] Dutch Court of Appeals, Case No. BC7373.
[73] Dutch Supreme Court, 20 April 2010, Case No. BK8132.
[74] The Guardian (n 69).
[75] Ibid.
[76] New York Times, '8-Year Sentence for Businessman Who Smuggled Arms to Liberia' 8 June 2006, A8; New York Times, 'Arms Ruling Overturned by Dutch' 11 March 2008, A10.
[77] Comisión Nacional sobre la Desaparición de Personas (CONADEP), *Nunca Más* (20 September 1984).

majority of the 5,000 detainees at Campo de Mayo, the country's biggest prison, most of who were later executed, had been active in the labour movement. About a hundred unionists and dozens of the work council members of car manufacturers *Ford* and *Mercedes-Benz* were detained there.[78]

Since the fall of the military junta in 1983, Argentina has been an innovator of transitional justice mechanisms. In December 1983, it established CONADEP, considered the first truth commission, and was the first country to convict a head of state for human rights violations in the contemporary era. With the repeal in 2003 of its amnesty laws, the Supreme Court reopened the possibility of human rights litigation in Argentina for abuses committed during the dictatorship. Now Argentinian prosecutors are also taking innovative steps to address the responsibility of company and individual businessmen.[79] The theme of the yearly march in Buenos Aires on the 24 March 2012 anniversary of the military coup was the connection of 'economic groups' to the *coup d'état* and the regime it installed. At the end of the event, on the stage where the final speeches were broadcast, a screen projected the names of companies allegedly complicit in the dictatorship. Investigations of such complicity, and in particular of the role of banks in financing the military junta, took off in the aftermath of the march.[80] 'The quest to end impunity in Argentina continues with renewed fervour…motivated by a widespread sense that justice has not yet been achieved', Juan Pablo Bohoslavsky and Veerle Opgenhaffenv write.[81]

In 2006, three decades after the *coup* of 1976, a paper by historian Victoria Basualdo addressing corporate complicity shed light on the role played by business leaders during the dictatorship.[82] Its publication opened the door to investigations to explore the issue further. In 2015, the Ministry of Justice and Human Rights published an exhaustive study that

[78] W Kaleck, 'International Criminal Law and Transnational Businesses: Cases from Argentina and Colombia' in Michalowski (n 61), 178.
[79] LA Payne and G Pereira, 'Accountability for Corporate Complicity in Human Rights Violations: Argentina's Transitional Justice Innovation?' in H Verbitsky and J Bohoslavsky (eds.), The Economic Accomplices to the Argentine Dictatorship (CUP 2015), 29-44, 'Corporate Complicity in International Human Rights Violations' (2016) 12 Annual Rev L Social Science 63.
[80] JP Bohoslavsky and V Opgenhaffen, 'The Past and Present of Bank Responsibility for Financing the Argentinean Dictatorship' (2009) 23 Harvard Human Rights J 157.
[81] Ibid., 197-201.
[82] V Basualdo 'Complicidad patronal-militar en la última dictadura argentina: Los casos de Acindar, Astarsa, Dálmine Siderca, Ford, Ledesma y Mercedes Benz' (March 2006) 5 Revista Engranajes de la Federación de Trabajadores de la Industria y Afines.

investigated 'business responsibility in crimes against humanity'.[83] The investigation analysed 25 companies across different sectors, including *FIAT*, *Ford Motor*, and *Mercedes-Benz*. The report found that in the majority of cases, directors and managers had played an active role in the arrest, kidnapping, torture and enforced disappearances of 900 workers.[84] Even more common was the vast deployment of military and security forces on factory grounds; some corporate officials explicitly sought this military intervention and provided logistical or financial support.[85] The report indicates the installation of clandestine detention and torture centres on company premises as the 'most extreme manifestation of the widespread militarization of factories during the dictatorship'.[86]

Criminal prosecutions against corporate officers followed.[87] An emblematic case involves the trial of the corporate leaders of the *Ledesma* sugar mill, accused of cooperating with the death squads that abducted dozens of people in Jujuy in the mid 1970s. In 2012, the Federal Court in Jujuy prosecuted the director of *Ledesma*, Pedro Blaquier, and former manager Alberto Lemos, over complicity in arbitrary arrests and enforced disappearances. The prosecution related to their suspected involvement in the so-called *noche de apagón* (night of the blackout). Allegedly, on the night of 21st July 1976, with technical assistance from *Ledesma*, electrical power was cut off in the entire municipality. Using military and company vehicles, members of the military arrested about 400 people, mainly unionists and employees of *Ledesma* – 55 people are still disappeared.[88] A raid of the company revealed intelligence reports compiled for *Ledesma* on trade unionists, who subsequently disappeared.[89] In addition, *Ledesma* allegedly allowed the armed forces to set up a clandestine detention centre, *Escuadrón 20*, on its grounds. In 2015, the Federal Court dismissed the charges against Blaquier and Lemos concluding that there was no evidence of the involvement of the two directors in the crimes.[90]

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[83] Argentina Justice Ministry's Truth and Justice Programme and the Human Rights Secretariat, 'Business responsibility in crimes against humanity: The repression of workers during state terrorism' December 2015.
[84] UN Office of the High Commissioner for Human Rights (OHCHR), 'Argentina dictatorship: UN experts back creation of commission on role business people played' 10 November 2015.
[85] Ibid.
[86] Argentina Justice Ministry (n 83).
[87] In addition to Ledesma, Mercedes-Benz, and Ford Motor Company discussed here, top officers from the following companies are being currently prosecuted for direct involvement in human rights abuses: Techint; Atarsa; Minera Aguilar S.A.; Loma Negra, La Veloz del Norte, and Acindar.
[88] Kaleck (n 78), 178-79.
[89] ECCHR, 'Corporations supported the Argentinian military dictatorship' <https://www.ecchr.eu/en/our_work/business-and-human-rights/corporations-and-dictatorships.html> (accessed 8 September 2017).
[90] Ibid.

In 2013, an Appeals Court confirmed the charges for crimes against humanity against Pedro Muller, Guillermo Galarraga, and Hector Francisco Jesus Sibilla, three former executives of *Ford Motor Argentina*.[91] The criminal complaint filed against them alleged that they conspired with the regime in political repression, abductions and mistreatment of *Ford*'s workers and union organisers. The public prosecutor charged that the military operated a detention centre within *Ford*'s factory complex in Buenos Aires and that company officials gave names, ID numbers, pictures and home addresses to security forces who arrested 25 *Ford*'s trade union leaders, and illegally detained and tortured them.

A similar lawsuit against the manager of *Mercedes-Benz* involves the company's creation of a 'blacklist' of workers who were subsequently kidnapped.[92] The case concerned 16 union activists working at the *Mercedes-Benz* plant in Buenos Aires, who were arrested by the military police in 1976 and disappeared. Journalist Gaby Weber, who investigated the case, described her motivation: 'I wanted to research where the real power was concentrated. And this is not the military and its retired generals…I was looking for a German company…that had a skeleton in the cupboard'.[93]

Based on her research, in 1999 a criminal complaint was filed in Germany against Juan Tasselkraut, a senior manager at *Mercedes-Benz Argentina*. It was alleged that he facilitated the arrest, torture and disappearance of a union worker by giving military personnel access to him in the workplace and by passing on the private addresses of other workers. In 2003, the public prosecution discontinued these proceedings for insufficient evidence, as the murder of the unionist was not proved.[94] Because the case was filed before the entry into force of the Rome Statute, crimes against humanity, including enforced disappearance, did not constitute a crime in German law, thus the charges were of only of murder. In addition, because German law does not provide for corporate liability, the case was filed only against the manager of *Mercedes-Benz*.[95]

[91] Case no. 4012/3, 20 May 2013.
[92] ECCHR (n 89).
[93] G Weber, *Die Verschwundenen von Mercedes Benz* (Verlag Assoziation 2001).
[94] ECCHR (n 89).
[95] Kaleck (n 78), 180-83.

Cases targeting businesspeople, either under the national law of the country where they committed abuses or through the use of extraterritorial jurisdiction are an important remedy for victims of violations. Individual liability should be seen as complementary to corporate liability: even if the liability of individuals associated with the company such as directors or managers is established, this does not preclude corporate criminal liability.[96] While under certain circumstances and depending on the underlying sentencing purposes, targeting individual businessmen may be an effective option, to a prosecutor both avenues of criminal prosecution should be left open.

Despite being conceptually possible, however, the criminal prosecution of corporations at the domestic level for violations under international human rights law or crimes under international criminal law still represent the exception and have been largely unsuccessful. The recent 'French cases' against *Amesys*, *Qosmos* and *LafargeHolcim*, described above, represent an interesting development, but they are all still pending and their outcome remains unclear. Another possible venue to provide accountability for corporate violations in the context of transitional justice lies in an expansion of domestic civil liability, which the next section examines.

III.2 Civil Litigation

Under domestic civil liability law, a company may be held responsible and be required to pay compensatory or punitive damages to an aggrieved party if found guilty of violation of a civil law, tort, or breach of contract.[97] Although the law of civil remedies does not use the terminology of human rights law, in all jurisdictions it protects 'interests' such as life, liberty, dignity, physical and mental integrity, and property. In countries that do not recognise the criminal liability of corporations the law of civil remedies provides victims with their only domestic venue to seek corporate accountability. Civil liability is an important means of assuring legal accountability when a company is complicit in gross human rights abuses.[98]

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[96] Clough and Mulhern (n 9), 8.
[97] B Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley J Intl L 45; JE Malamud-Goti and LS Grosman, 'Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies' in P de Greiff (ed.), *The Handbook of Reparations* (OUP 2006), 539; R Meeran, 'Tort Litigation Against Multinational Corporations for Violation of Human Rights: A View of the Position Outside the United States' (2001) 3(1) City Univ Hong Kong L Rev 1, 3.
[98] International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), vol III, 4-5.

Civil liability gives more latitude than criminal liability for several reasons. First, compared to criminal prosecution, establishing a tortious act requires a lower burden of proof, and proving both liability and causation in a tortious suit may be easier than attributing criminal liability and causation.[99] Second, victims do not have to wait for the decision of a state prosecutor for the case to commence. Third, across jurisdictions, there are similar principles of civil liability for companies - the law of civil remedies always has the ability to deal with the conduct of companies, as well as of individuals and state authorities. [100]

There are, however, some important drawbacks too. *Ratione temporis*, civil liability is generally restricted in time and does not benefit from the absence of statutes of limitations attaching to the commission of international crimes in domestic criminal law, which is important considering the frequent long time lapses between the perpetration of the crimes and the moment when victims are able to seek remedy.[101] Further, in criminal liability, the impact on the reputation of the corporation is arguably more serious, which may make future deterrence more likely.[102] In addition, the negligent or intentional conduct of the company involved in human rights abuses is not necessarily assessed against the standards of international human rights law and international criminal law. Arguably, when non-criminal liability is imposed for serious crimes, this may put the severity of the crime and the importance of the protected value in doubt.[103]

Extraterritorial civil liability has provided an important avenue in a post-conflict transitional context where victims often face obstacles to access to justice in the country where the harm was inflicted. [104] Tort claims against the parent corporation of a multinational group brought in civil courts of the home state test the extraterritorial limits of civil litigation rules.[105] This is a practice sometimes referred as 'foreign direct liability' - a term intended to reflect the flip side

[99] Fafo (n 12), 24.
[100] Ramasastry, 'Corporate Complicity' (n 32), 151-53; International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), Vol. III, 4-5.
[101] Bismuth (n 1), 221-222
[102] Kremnitzer (n 15), 915; T Weigend, 'Societas delinquere non potest? A German Perspective' (2008) 6 J Intl Criminal Justice 927, 931.
[103] Ibid.
[104] International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), vol. III, 50-51.
[105] J Kyriakakis, 'Corporations Before International Criminal Courts: Implications for the International Criminal Justice Project' (2017) 30(1) Leiden J Intl L 221, 233.

of foreign direct investment.[106] The United States, the United Kingdom, the Netherlands and Canada, among others, have examined civil claims against companies for complicity in human rights violations committed in other countries in times of conflict or repression. While jurisdictions outside the United States have been used,[107] the literature and practice on transnational civil claims has principally focused on US law.[108] In particular, a great deal of attention has been paid to high-profile litigation against multinational corporations under the US Alien Tort Statute (ATS), also called Alien Tort Claims Act (ATCA),[109] the largest body of domestic jurisprudence regarding corporate responsibility for violations of international law. The next sections discuss ATS cases most relevant in transitional justice contexts.

The Alien Tort Statute

Enacted in 1789, the ATS reads as follows: 'The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[110] In other words, it allows US courts to adjudicate civil actions involving breaches of international law.[111] Originally, the ATS was intended to protect against 'violation of safe conducts, infringement on the rights of ambassadors, and piracy' and the statute remained dormant for almost two centuries. In 1980, it was revived when it was successfully invoked in a claim on behalf of two Paraguayan nationals against a former Paraguayan police officer, based in New York at the time of the case, for having tortured to death a member of their family in Paraguay.[112] Although the ATS makes no reference to human rights, the claim led to the landmark decision *Filartiga v. Pena-Irala*, which enabled victims of certain international human rights abuses to bring civil actions in US

[106] P Muchlinski, 'The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post Financial Crisis World' (2011) 18(2) Indiana J Global Legal Studies 665, 685-90; Kyriakakis (n 105), 232.
[107] eg, UK (eg *Bodo v. Shell*), Netherlands (eg *Oruma v. Shell*), and Canada (eg Anvil mining case).
[108] van Ho (n 61); MV Hristova, 'The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility' (2012) 47 Univ San Francisco L Rev 89.
[109] SH Cleveland, 'The Alien Tort Statute, Civil Society, and Corporate Responsibility' (2004) 56 Rutgers L Rev 971; B Stephens, 'Corporate Liability before and after Sosa v. Alvarez-Machain' (2004) 56 Rutgers L Rev 995; RL Herz, 'The Liberalizing Effects of Tort: How Corporate Complicity Liability under the Alien Tort Statute Advances Constructive Engagement' (2008) 21 Harvard Human Rights J 207.
[110] Alien Tort Claims Act, 28 U.S.C. para 1350 (2000), a section of the Judiciary Act of 1789.
[111] 'Well-established, universally recognized norms of international law' as explained in *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995).
[112] *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

federal courts.[113] Access to judicial remedies in Paraguay had been denied by the dictatorship of General Alfredo Stroessner, and the ATS made it possible for victims to find a form of justice.

Following the *Filartiga* decision, a wave of human rights cases was filed under the ATS, and beginning in the 1990s, human rights advocates began to use the law against corporations for a wide range of activities, including complicity in torture, extrajudicial killings, enforced disappearances, arbitrary arrests, and forced labour committed during times of conflict or repression.[114] Indeed, before the round of cases in US courts, no corporation had ever been charged with or convicted for an international crime.[115] Occasional suggestions to the contrary by human rights scholars are mistaken.[116] The following sections analyses tort actions under the ATS that have pursued compensation from corporations accused of complicity in abuses of regimes in Myanmar, Sudan, Indonesia, and the Philippines, for their profits from the Holocaust and its victims, and for their involvement in the Apartheid regime.[117]

Unocal (re Myanmar)

In *Doe v. Unocal*, the first ATS case brought against a corporation in 1996, a group of Myanmar nationals alleged that US-based *Unocal* (since bought by *Chevron*), aided and abetted the Myanmar military in the commission of human rights abuses such as forced labour, murder, rape and torture during the construction of a gas pipeline that runs across Myanmar into Thailand.[118] *Unocal* and Myanmar's military government were in a consortium for the pipeline's construction. The same charges were brought against the French oil company *Total*,

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[113] Ibid. See also, B Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27 Yale J Intl L 1 (2002).

[114] eg, *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), 27 F. Supp. 2D 1174, 1184 (C.D. Cal. 1998), 110 F.Supp.2d 1294 (C.D. California, 2000), 248 F.3d 915 (9th Circuit, 2001), 395 F.3d 932 (9th Circuit, 2002) [*Unocal* case]; *Wiwa V. Royal Dutch Petroleum Co.*, 225 F..3d 88 (2nd Circuit, 2000) [*Wiwa v. Shell* case]; *Doe v. Exxon Mobil Corp*., 393 F. Supp. 2d 20 (D.D.C. 2005). 80 [*ExxonMobil* case]; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2006 U.S. Dist. LEXIS 86609 (S.D.N.Y. Dec. 4, 2006). 82 [*Talisman* case]; *Mujica v. Occidental Petroleum Co.*, 381 F. Supp. 2d 1164 (C.D.Cal. 2005) [*Occidental* case]. See also, S Coliver and others, 'Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies' (2005) 19 Emory Intl L Rev169.

[115] J Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 Columbia L Rev 1098.

[116] H Hongju Koh, 'Separating Myth from Reality About Corporate Responsibility Litigation' (2004) 7 J Intl Econ L 263, 266 (confusing Nuremberg tribunals that tried Flick, Krupp, and I.G. Farben officials with Nuremberg tribunal that was permitted by 'the Nuremberg Charter' to designate groups or organizations as criminal, but that did not adjudge any corporations or firms); Stephens (n 97), 76 (confusing court's finding of Farben's offenses, for which evidence was abundant, with legal finding of corporate guilt as an entity).

[117] eg, *Unocal*, *ExxonMobil*, *Talisman* cases (n 114).

[118] *Unocal* (n 114).

the actual operating company of the joint venture with *Unocal*, but they were dismissed because *Total* lacked a sufficient business presence in the United States for US courts to exercise jurisdiction. The trial court held that there was no evidence that the company desired the military's violation, and as a result, *Unocal* could not be held liable. The court held that in order to be liable, *Unocal* must have taken active steps in cooperating or participating in forced labour activities. Mere knowledge that someone else might commit abuses was not sufficient.[119]

The court of appeals reversed the trial court's decision, setting a precedent by agreeing to hear cases whereby corporations are charged for human rights violations committed abroad. The court noted that for certain violations of international law private actors might be liable absent state action.[120] In relation to whether the ATS applies to corporations (*ratione personae*), it was established in *Karadzic* that some violations of the law of nations, including war crimes and violations of international humanitarian law, could be committed by non-state actors.[121] Citing the *Karadzic* decision, the court observed that participation in the slave trade 'violates the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals'.[122] Just prior to a hearing by the court of appeals in 2004, the parties reached an out-of-court settlement, in which *Unocal* denied any complicity, but agreed to compensate the plaintiffs and provide funds for programmes in Myanmar to improve living conditions and protect the rights of people from the pipeline region - the exact terms of the settlement are confidential.[123]

Unocal is to this day the only decision under the ATS that regarded it as sufficient that the corporations should have been aware of the consequences of its acts. Relying on the *Furundzija* decision of the ICTY, the court set the *mens rea* standard to be one of 'actual or constructive (i.e. "reasonable") knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime"'.[124] Applying this to the facts of the case, the court regarded it as sufficient that 'Unocal knew or should reasonably have known that its conduct – including the payments and the instructions where to provide security and build

[119] Ramasastry, 'Corporate Complicity' (n 32), 130-39.
[120] *Unocal* (n 114).
[121] Kadić v. Karadzić (111).
[122] Ibid., 891.
[123] *Unocal* (n 114).
[124] *Unocal* (n 117), 395 F.3d 932 (9th Cir. 2002), 950 (quoting *Prosecutor v. Furundzija*, para 245).

infrastructure – would assist or encourage the Myanmar Military to subject the Plaintiffs to forced labour'.[125]

Talisman Energy (re Sudan)

The extension of the ATS to corporations, expressly acknowledged in *Unocal*, was then explained in greater detail in *Presbyterian Church of Sudan v. Talisman Energy* where the court considered that 'corporations may also be held liable under international law, at least for gross human rights violations'.[126] Canadian oil producer *Talisman* was sued for supporting the Sudanese military during civil war. The plaintiffs alleged that the Sudanese government was engaged in an armed campaign of ethnic cleansing against the non-Muslim Sudanese, which included massive displacement, extrajudicial killing, torture and rape. They alleged that *Talisman* was complicit in such crimes against people living in the area of *Talisman*'s oil concession and that these abuses amounted to genocide. The case was dismissed because of insufficient admissible evidence and later the court of appeals found that to determine liability under the ATS the plaintiffs must have shown that the defendant 'purposefully' aided and abetted a violation of international law.[127]

Ingrid Gubbay criticizes the 'purpose test' established in the *Talisman* ruling, according to which a company is only liable for aiding and abetting violations of international law where it has provided substantial assistance *with the specific aim* of furthering the violation.[128] In *Talisman* the application of this test led to the conclusion that by letting the Sudanese regime use their airstrips the company had not aided and abetted the international crimes of the regime because they did not share the intent of furthering the crimes. Arguably, it would have been more accurate the use of a looser test, known as the 'knowledge' test, whereby aiding and abetting is established if the company knew or should have known about the violations, without necessarily aiming to furthering the crimes.[129] The 'knowledge' element generally translates into the question: did the business entity know, or should it have known

[125] Ibid., 953.
[126] *Talisman* (n 114).
[127] Ibid.
[128] Lecture by I Gubbay, Hausfeld & Co LLP, at Institute of Advanced Legal Studies in London, 19 February 2013.
[129] Ibid.

that the business activities contributed to international crimes or gross human rights violations? [130]

ExxonMobil (re Indonesia)

Another relevant ATS case concerns *ExxonMobil*'s role in employing the Indonesian military forces (*Tentara Nasional Indonesia* - TNI) to protect its natural gas facilities in Aceh, Indonesia. In 2001, the International Labor Rights Fund brought a case in US Federal Court under the ATS on behalf of eleven surviving family members of victims of human rights abuses, including torture, rape, and killings, allegedly committed by members of the TNI. Following the discovery of vast natural gas fields, *ExxonMobil* helped build one of the largest and most profitable natural gas facilities in the world in Arun, north Aceh, in 1971. Very little of the profit that flowed from these operations remained in Aceh, and this inequality contributed to formation of the Free Aceh Movement (*Gerakan Aceh Merdeka* - GAM) in 1976. In its initial contract with Suharto, the president of Indonesia from 1967 to 1998, *Mobil* (which later merged with *Exxon*) agreed to hire members of the TNI as private security personnel. As the security situation in Aceh deteriorated, *ExxonMobil* increased its reliance on the TNI.

According to the plaintiffs' claims, by 2000 *ExxonMobil* was paying more than $500,000 a month to the TNI.[131] The lawsuit alleged that *ExxonMobil* helped to equip and train TNI members who provided private security to its Aceh operations.[132] The Indonesian government used the threat to the immense revenue generated at the Arun facility to justify its increased militarization of Aceh. This in turn led to escalation of the conflict between the TNI and GAM. Fighting between GAM and the TNI had a severe impact on civilians, especially those who lived near the *ExxonMobil* facility. The plaintiffs argued that *ExxonMobil* should have been aware of the high degree of risk that TNI security personnel might commit human rights abuses.[133] The corporation should have taken appropriate measures after it became aware that Indonesian military forces acting as its agents were committing serious violations.

In 2015, a US federal court ruled that the plaintiffs' claims sufficiently 'touch[ed] and

[130] International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), 18-20.
[131] *ExxonMobil* (n 114).
[132] Ibid.
[133] Ibid.

concern[ed]' the Unites States and therefore could proceed in US courts.[134] The court accepted 'as true for purposes of this motion' the assertion that *ExxonMobil* exercised substantial control over the activities of the soldiers.[135] The significance of the *ExxonMobil* case in Aceh is that it provided a strong contribution to transitional justice processes in Indonesia. The *ExxonMobil* case represents an opportunity to investigate the conflict in Aceh and to give acknowledgement to the victims of the Indonesian military and indirectly the actions of multinational corporations. To date, there has been limited judicial accountability for crimes committed by the TNI in Aceh despite evidence of their involvement in mass crimes. Commitments that were part of the 2005 *Helsinki Memorandum of Understanding*, to establish a truth and reconciliation commission and a human rights court, have not been fulfilled.[136] Although this case does not examine every aspect of the Aceh conflict and represents the claims of only a small number of victims, it is important in achieving some degree of accountability for human rights abuses committed in Aceh. The case has dragged on for more than 16 and victims are still waiting for justice.

Closing of the ATS door after the *Kiobel* decision

Occasionally cases under the ATS have alleged the direct commission of violations by a company as the principal perpetrator - for example, the private military company *Blackwater* as well as several of its private contractors were accused of war crimes committed against civilians in Iraq.[137] For the most part, however, cases against companies under ATS have involved claims of complicity, where the direct perpetrators of human rights violations were public or private security forces, other government agents, or armed factions in civil conflicts.[138] These cases have produced a range of solutions.[139] Some courts that have dealt with ATS claims for company complicity in human rights abuses have referred to and applied the international criminal law standards of aiding and abetting.[140] Some federal courts cited the

[134] Ibid.
[135] Ibid.
[136] International Center for Transitional Justice, A Matter of Complicity? Exxon Mobil on Trial for its Role in Human Rights Violations in Aceh (ICTJ 2008), 3.
[137] A suit was filed under the ATS on behalf of an injured survivor and three families of men killed in the incident.
[138] eg *Unocal* case, *Talisman* case (n 114). See also Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie , 'Clarifying the Concepts of "Sphere of influence" and "Complicity"' 15 May 2008, para. 29; van Ho (n 61), 64; S Bhashyam, 'Knowledge or Purpose? The Khulumani Litigation and the Standard for Aiding and Abetting Liability Under Alien Tort Claims Act' (2008) 30 Cardozo L Rev 245, 248.
[139] Y Farah, 'Toward a Multi-Directional Approach to Corporate Accountability', in Michalowski (n 61), 42.
[140] eg, *Khulumani v. Barclay National Bank*, 504 F.3d 254, 276 (2d Cir., 2007) [*Khulumani*]; *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 285-286 & n.33 (E.D.N.Y. 2007) [*Almog v. Arab Bank*]; *Talisman* case (n 114).

Nuremberg *Industrial* cases*,* which demonstrate how certain corporations could be an 'instrumentality of cohesion in the name of which the enumerated acts…were committed.'[141] Relying on this precedent, which did not recognize the actual criminal liability of corporations, the court, however, considered that 'limitations on criminal liability of corporations do not necessarily apply to civil liability of corporations,' thus exploiting the civil aspect of the ATS to extend its reach to corporations.[142] Since the *South Africa Apartheid Litigation* judgment (analysed below), whereby Judge Korman in his minority opinion raised the objection that multinational corporations might not be sued under the ATS as they are not subjects of international law, multinational corporations summoned in ATS litigations for violation international human rights norms have started to include such an objection among their defence strategies.

In September 2010, this theory was upheld by the Court of Appeals for the Second Circuit in the *Kiobel v. Royal Dutch Petroleum Co* case.[143] The Second Circuit dismissed *Kiobel*, with a divided opinion holding that the ATS did not apply to corporations.[144] The foundational premise relied upon by *Kiobel* is that the actors in international law are almost exclusively states - therefore, private corporations do not have obligations under international law and thus cannot have liability under the ATS.[145] *Sarei v. Rio Tinto* had relied on dissolution of *I.G. Farben* after War World II and of jurisprudence of the International Court of Justice to find that prohibition against genocide extends to corporations.[146] But the Second Circuit in *Kiobel* relied on the fact that no international criminal tribunal has ever prosecuted a company.[147] The *Kiobel* majority asserted that the fact that only individuals were charged at Nuremberg definitively demonstrated that there was no accountability mechanism under international law

[141] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. VIII.
[142] Bismuth (n 1), 222-25.
[143] *Kiobel v. Royal Dutch Petro. Co.*, 621 F.3d 111 (2d Cir. 2010), 642 F.3d 379 (2d Cir. 2011), 2011 WL 2326721 (U.S. June 6, 2011), 79 U.S.L.W. 3728 (U.S. Oct. 17, 2011) (No. 10-1491), 133 S.Ct. 1659 (2013) [*Kiobel* case].
[144] Ibid., 79 U.S.L.W. 3728 (U.S. Oct. 17, 2011) (No. 10-1491) (Leval, J. Concurring). See also, I Wuerth, 'The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co.' (2013) 107 AJIL; A Colengelo, 'A Unified Approach to Extraterritoriality' (2011) 97 Virginia L Rev 1019 (2011).
[145] *Kiobel* (n 143), 621 F.3d, 122.
[146] *Sarei v. Rio Tinto*, 760-61.
[147] *Kiobel* (n 143), 132-45. See also van Ho (n 61), 62-63; O Murray, D Kinley and C Pitts, 'Exaggerated Rumors of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case Of Kiobel' (2011) 12 Melb J Intl L 57, 80-81; A Mamolea, "The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap' (2011) 51 Santa Clara L Rev 79, 100-01.

for pursuing *I.G. Farben* as a juristic entity.[148] Tyler Giannini and Susan Farbstein rightly contend, 'this argument misses the mark': the lack of charges against the corporation does not indicate anything about corporate liability under international law.[149] The lack of criminal prosecution of corporations at Nuremberg does not support the conclusion in *Kiobel* that international law excludes juristic entities from liability. It only means that criminal prosecution was not chosen in that particular instance. [150]

In February 2012, during the Supreme Court oral arguments in the appeal, the focus shifted to the ATS's extraterritorial reach. Justice Kennedy questioned whether any other jurisdiction in the world 'permits its courts to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection'.[151] Thus, the Court ordered the parties to reargue the case on this question: 'Whether and under what circumstances the Alien Tort Statute allows courts to recognize a cause of action for violation of the law of nations occurring within the territory of a sovereign other than the United States'.[152]

In April 2013, the Supreme Court dismissed the case for lack of jurisdiction under the ATS.[153] The ruling stated that the ATS could not be invoked for cases where the conduct did not 'touch and concern' the territory of the United States with sufficient force as to displace the 'presumption against extraterritorial application' (i.e. that the ATS does not apply to conducts outside the United States).[154]

Kiobel's denial of corporate liability in the ATS context generated a split of circuit authority[155]

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[148] *Kiobel* (n 143), 2010 U.S. App. 19382, 32-33. See also, *Khulumani* (n 140), Korman, J., dissenting.
[149] T Giannini and S Farbstein, 'Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights' (2010) 52 HILJ 130.
[150] Ibid., 131.
[151] Justice Alito, added 'there's no particular connection between the events here and the United States…What business does a case like that have in the courts of the United States?' Chief Justice Roberts further added: 'If there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn't it a legitimate concern that the suit itself contravenes international law?' *Kiobel* (n 143), Transcript of Oral Argument, 3, 7, 8.
[152] JG Ruggie, 'Kiobel And Corporate Social Responsibility. An Issues Brief', 4 September 2012.
[153] Affaire Association France-Palestine Solidarité AFPS c/ Société Alstom Transport SA, Cour d'Appel de Versailles, 22 March 2013.
[154] *Kiobel* (n 143), Case No 10-1491, 2013 (U.S. Apr. 17, 2013), 1669.
[155] Compare *Kiobel* (n 143), 621 F.3d 111 2d Cir. 2010) (holding private corporations cannot have liability) with *Doe v. Exxon*, 654 F.3d 11 (D.C. Cir. 2011) (corporations can have liability).

and divided scholarship,[156] including on whether corporations have direct human rights obligations under customary international law.[157] In April 2017, the US Supreme Court agreed to hear a new ATS case, *Jesner v. Arab Bank*.[158] The sole question for consideration is whether the ATS 'categorically forecloses corporate liability.'[159] The case concerns *Arab Bank*, which is based in Jordan and has been accused of processing financial transactions through a branch in New York for groups linked to terrorism. The plaintiffs in the case seek to hold the bank liable for attacks in Israel and in the Palestinian territories by Hamas and other groups.[160] They said the bank had 'served as the "paymaster" for Hamas and other terrorist organizations, helping them identify and pay the families of suicide bombers and other terrorists'.[161] In *Kiobel* the Supreme Court did not answer the question it had initially agreed to consider, whether corporations are categorically excluded from the law. The *Arab Bank* case is likely to produce that answer.

Arguments have been made to consider multinational corporations as 'modern day pirates'. Justice Breyer in a separate opinion considered 'pirates' in their modern form to include international violators such as 'torturers or perpetrators of genocide'.[162] This suggests that if multinational companies are alleged to be involved in such violations they should be held accountable just like the pirates of the past.[163]

The *Kiobel* decision on the presumption against extraterritoriality has limited the claims that can be brought under the ATS for victims of corporate abuses, including in a transitional justice contexts. The Second Circuit majority, in the words of concurring Judge Leval, dealt 'a

[156] B Thompson, 'Was Kiobel Detrimental to Corporate Social Responsibility: Applying Lessons Learnt from American Exceptionalism' (2014) 30 Utrecht J Intl Europ L 82; R McCorquodale, 'Waving Not Drowning: Kiobel Outside the United States' (2013) 107 AJIL 846, 'Debate: The Alien Tort Statute and Corporate Liability' (2011) 160 Univ Pennsylvania L Rev 99; U Kohl, 'Corporate Human Rights Accountability: the Objections of Western Governments to the Alien Tort Statute' (2014) 63 Intl Comp L Quarterly 665; B Stephens, 'The Curious History of the Alien Tort Statute' (2014) 89 Notre Dame L Rev 1467; R Alford, 'The Future of Human Rights Litigation after Kiobel' (2014) 89 Notre Dame L Rev 1749; J Ku, 'The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking' (2011) 51 Va J Intl L 353 (2011); Giannini and Farbstein (n 149); E Engle, 'Kiobel v. Royal Dutch Petroleum Co.: Corporate Liability Under The Alien Tort Statute' (2012) 34 Hous J Intl L 499.
[157] Ku (n 156).
[158] *Jesner v Arab Bank PLC*, No. 16-499.
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] Ibid., Separate opinion by Justice Breyer, 5.
[163] A Tamo, 'Corporate Complicity for Human Rights Violations in Africa Post-Kiobel Case', in J Letnar Černič and T van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights Abuses* (Wolf Legal Publishers 2015), 447, 470.

substantial blow to international law and its undertaking to protect fundamental human rights'.[164] In rejecting corporate liability under the ATS, the Second Circuit embraced a statist approach to international law. The reach of *Kiobel* decision and its impact on the accountability of companies involved in violations during times of conflict or repression is not clear yet, but preliminary evidence shows that it contributed directly to the dismissal of at least three such cases: against *Chiquita*, against *Drummond*, and in the *Apartheid Litigation* case.

In *Chiquita*, the first such case to reach the Supreme Court after *Kiobel*, in April 2015, the court declined to hear the case because all the relevant conduct occurred outside the United States. The case had been on-going since 2007. It concerned more than 4,000 plaintiffs who contended that the funds that *Chiquita* paid to Colombian paramilitary organizations, from the 1990s through 2004, made the company complicit in extrajudicial killings, torture, forced disappearances, crimes against humanity and war crimes committed in *Chiquita*'s Colombian banana-growing region.[165]

Several cases were also filed under the ATS against *Drummond*, a coal mining company headquartered in the United States and operating in Colombia.[166] In 2002, the families of three deceased Colombian labour leaders, and the union they belonged to, filed a suit in US federal court against *Drummond* and its subsidiary in Colombia. The plaintiffs alleged that *Drummond* hired Colombian paramilitaries to kill and torture the three labour leaders in 2001.[167] In 2009, the children of the three union leaders filed new lawsuits in the US alleging *Drummond*'s complicity in the killings, and that the company had made payments to the paramilitary group *Autodefensas Unidas de Colombia* (AUC) to kill labour leaders. Those cases were dismissed on similar grounds: the courts found they no longer had jurisdiction to hear the case, citing the decision in *Kiobel*.[168]

The question then moves to what standard is necessary to provide a sufficient connection to the United States, to disprove the presumption against extraterritoriality. The *South Africa*

[164] *Kiobel* (n 143), 2010 U.S. App. LEXIS 19382, at 113 (Leval, J., concurring). Judge Leval disagreed with the majority's position that corporate liability does not exist under customary international law, ibid., 113.
[165] *In re: Chiquita Brands International, Inc.*, Alien Tort Statute and Shareholders Derivative Litigation, Transfer Order, Feb. 20, 2008.
[166] *Romero v. Drummond Company, Inc.*, 430 F.3d 1234, 1243 (11 Cir. 2007); *Estate of Rodriguez v. Drummond Company, Inc*, 256 F Supp 2d 1250, 1257 (N.D. Ala. 2003).
[167] Ibid.
[168] Ibid., on the basis that the 'allegations and evidence…do not show conduct focused in the United States'.

Apartheid Litigation, detailed below, provides some elements to answer this question. In 2013, the Court of Appeal recommended dismissing the *Apartheid Litigation* citing the limitation on extraterritorial application of the ATS in *Kiobel*. The lower court ruled the plaintiffs could amend their complaints against two of the defendants to provide evidence that the companies' activities 'touch and concern' the territory of the United States.[169] The judge said that in order to overcome the presumption against extraterritoriality set forth in *Kiobel*, the plaintiffs must show corporate presence, in addition to other factors. In 2014, the lower court judge dismissed the case finding that the plaintiffs had not shown a sufficient connection with the United States to warrant the case being heard in US courts.

While *Kiobel* has clearly narrowed the options under the ATS, it has not eliminated them. For example in the case against *ExxonMobil*, examined above, a US federal court decided in 2015 that the claims sufficiently 'touch and concern[ed]' the United States, as to overcome the presumption against extraterritoriality that applies to ATS after *Kiobel*, and allowed the case to proceed. Noting that the 'primary inquiry in deciding whether the presumption against extraterritoriality is displaced is the location of the conduct at issue', the court found that plaintiffs had made 'numerous and detailed allegations' that *ExxonMobil* executives based in the United States had made decisions regarding the deployment of military security personnel in Indonesia. As federal courts continue to determine the parameters of the 'touch and concern' standard set forth in *Kiobel*, this decision is likely to be a key reference point for victims seeking remedies in transitional contexts.[170] As Austen Parrish notes: '*Kiobel* should not mark the end of human rights litigation…[rather, it] is time to rebuild the legitimacy of international law, and to reclaim international law and its institutions as primary methods for global governance'.[171]

The *South Africa Apartheid Litigation*

South Africa's transition from apartheid to democracy in 1994 is emblematic of the complex challenges that make corporate accountability and reparations for victims a difficult issue for transitional justice.[172] This is particularly clear in the way in which the South Africa's TRC

[169] *Khulumani* (n 140).
[170] *ExxonMobil* (n 114).
[171] A Parrish, 'Kiobel Insta-Symposium: A More Positive Outlook for International Law' (24 April 2013) Opinio Juris.
[172] P Clark and others 'Justice for Apartheid Crimes: Corporations, States, and Human Rights' (2009) Oxford Transitional Justice Research.

dealt with the issue of corporate involvement with the apartheid (examined in Chapter IV). It also shows the potential and problems of using the courts to hold corporations liable to redress the shortcomings of the TRC's approach and the government's implementation of the TRC's recommendations. The payment of reparations was described as the 'unfinished legacy' of the TRC. To the extent that ATS facilitated the payment of reparations, it can be considered a mechanism of transitional justice.[173]

As detailed in Chapter IV, in its final report, the South Africa TRC extensively documented the central role businesses played in sustaining the economy during apartheid.[174] The TRC recommended a number of reparation measures for business, including for example, a one-off 'wealth tax' on businesses that profited from apartheid. The South Africa government, however, did not implement any of the TRC's recommendations concerning business leaving victims unsatisfied.[175] As a consequence, in 2002, four years after the publishing of the TRC report, lawsuits were filed in the United States on behalf of South African victims against several multinationals corporations for aiding and abetting or otherwise participating in violations committed by the apartheid regime. The *South Africa Apartheid Litigation* addresses two cases in its 2009 consolidated amendment: the *Khulumani v. Barclays* case and the *Ntsebeza v. Daimler* case. [176]

In 2002, a group of South Africans, represented by the Khulumani Support Group, sued 20 banks and corporations that did business in South Africa during apartheid in US federal courts.[177] The case alleged that from the 1960s to the demise of apartheid in the early 1990s these corporations made it possible for key areas of apartheid to continue to operate despite a mounting worldwide campaign to isolate the South African government.[178] The plaintiffs

[173] M Swart, 'The Khulumani Litigation: Complementing The Work of the South African Truth and Reconciliation Commission' (2011) 16 Tilburg L Rev 30; C Abrahams, 'Lessons from the South African Experience' in Michalowski (n 61), 153.
[174] Truth and Reconciliation Commission of South Africa, *Final Report* (29 October 1998), Volume IV, Chapter II, 140.
[175] E Daly, 'Reparations in South Africa: A Cautionary Tale' (2003) 33 U Mem L Rev 367, 383-87.
[176] *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) [*South African Apartheid Litigation*]. For commentary on the case see, D Fig, 'Manufacturing Amnesia: Corporate Social Responsibility in South Africa' (2005) 81(3) Intl Affairs 599; Swart (n 173); S Michalowski, 'No Complicity Liability for Funding Gross Human Rights Violations?' (2012) 30 Berkeley J Intl L 451, 454-70; Abrahams (n 173); I Gubbay, 'Towards Making Blood Money Visible: Lessons Drawn from the Apartheid Litigation' in JP Bohoslavsky and J Letnar Černič, *Making Sovereign Financing & Human Rights Work* (Hart 2014).
[177] *South African Apartheid Litigation* (n 176).
[178] Ibid.

alleged that the participation of the defendant companies in key industries during the apartheid era was influential in encouraging and furthering abuses against black Africans. The plaintiffs were victims or relatives of victims of human rights abuses such as extrajudicial killings, torture and rape, and they alleged that the companies' activities in South Africa during the apartheid era made them complicit in the commission of those abuses.[179] The claimants relied on the legal theory of secondary liability for aiding and abetting crimes, arguing that banks and corporations aided and abetted the apartheid regime in the commission of international crimes. The original complaint argued:

> The participation of the defendants, companies in the key industries of oil, armaments, banking, transportation, technology, and mining, was instrumental in encouraging and furthering the abuses. Defendants' conduct was so integrally connected to the abuses that apartheid would not have occurred in the same way without their participation.[180]

The *Apartheid Litigation* received a wide array of criticisms.[181] The issue of apartheid, some critics said, had already been resolved domestically by South Africa; the TRC ran its course, and it achieved the peaceful transition to democracy that it was intended to achieve.[182] Digging the issues back up, as a scholar suggested, would 'subvert what the Truth and Reconciliation Commission sought to achieve.'[183] John Bellinger, a Legal Adviser to the US Secretary of State, remarked in 2008:

> Imagine what the U.S. reaction would be if a Swiss court sought to adjudicate claims brought against U.S. government officials or businesses for Jim Crow-era racial restrictions, or…even for slavery…United States has come to terms with and sought to remedy the effects of slavery and Jim Crow laws through domestic measures. From the South African perspective, the apartheid case must look very similar.[184]

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[179] Ibid.
[180] Ibid. See also, Abrahams (n 173), 162-72.
[181] JB Bellinger, Former Legal Advisor to US Secretary of State, 'Enforcing Human Rights in US. Courts and Abroad: The Alien Tort Statute and Other Approaches', Remarks at 2008 Jonathan I. Charney Lecture in International Law (2008).
[182] J Simcock 'Unfinished Business: Reconciling The Apartheid Reparation Litigation With South Africa's Truth and Reconciliation Commission' (2011) 47 Stan J Intl L 239, 240-41.
[183] Ibid.
[184] Bellinger (n 181).

The South African government initially opposed the lawsuit, and it filed documentation with both the district court and appeals court urging to dismiss the case.[185] The main argument of the so-called 'Maduna declaration' was that litigation in the United States interfered with South Africa's sovereignty.[186] The government officially justified their opposition to the *Apartheid Litigation* with the concern that such lawsuit could discourage foreign investment in South Africa and therefore be detrimental to the country's economic development.[187] The government attention focused on economic growth as a remedy to the apartheid legacy, which resulted in a policy of non-confrontation toward corporations and a lack of political will to follow the TRC recommendations regarding the accountability of corporations for their role in apartheid.[188] The government approach to the recommendations of the TRC was influenced by its 'Growth, Employment, and Redistribution' policy, which acknowledged the importance of fast economic growth and job creation as the only way out of poverty, inequality, and unemployment'.[189] Foreign and local private sector investment was regarded as crucial to achieve these goals. The avoidance of confrontation with the legacy of corporations by the South African government, however, is inconsistent with the aim of achieving justice for victims of their complicit behaviour. By focusing on growth, the government confused the rights of victims with the constitutionally guaranteed socioeconomic rights of all disadvantaged citizens. For example, claims of victims of torture or killing of family members should not be confused with general claims of all victims of apartheid to be lifted out of poverty and social exclusion.

The government said that South Africa deliberately avoided a 'victors' justice' approach to the crimes of apartheid and opted instead for a transitional justice process based on 'reconciliation, reconstruction, reparation and goodwill'.[190] It considered the remedies claimed before the US courts to be inconsistent with the government strategy of achieving reconciliation and social transformation through economic growth in partnership with private actors, including corporations.[191] The government feared that the litigation could have a negative effect on

[185] PM Maduna, 'Declaration by Justice Minister Pennell Maduna on Apartheid Litigation in the United States', 11 July 2003 [Maduna declaration].
[186] Ibid, para 2.
[187] Ibid..
[188] Abrahams (n 173), 158-62.
[189] Maduna declaration (n 185).
[190] Ibid., para 3.2.1.
[191] Ibid., para 10.

foreign investment so 'undermining economic stability'.[192] Alex Boraine, the vice-chairman of the TRC, argued that the lawsuit 'could damage investment and new jobs just when we need business to come here'.[193]

The government claims were contested by Archbishop Desmond Tutu, the TRC's chairman, and by other commissioners, who filed *amici curiae* in support of the litigation, which they considered 'entirely consistent' with the findings of the TRC'.[194] They argued that the litigation was unlikely to affect investment decisions and instead would have a positive effect of deterring threats to 'inequitable economic growth in South Africa'.[195] They pointed out that the TRC proceedings precluded litigation only against perpetrators who had been granted amnesties, which none of the defendants companies had received. 'There was absolutely nothing in the TRC process, its goals, or the pursuit of the overarching goal of reconciliation, linked with the truth, that would be impeded by this litigation', the commissioners said.[196] They further added that litigation was in line with the goals of transitional justice: 'by giving voice to those harmed by multinational corporations aiding and abetting apartheid, it assists the healing on reconciliation process'.[197] Archbishop Tutu had already concluded after the business hearings that these 'did not mean the end of the process, as there was the question of restitution and repairing the wrongs done'.[198]

The TRC process 'did not put an end to the pursuit of accountability for human rights violations committed under apartheid (but) in fact started it'.[199] The TRC expressly recognized bases for civil and criminal liability of certain business for their actions, including for aiding and abetting crimes committed by the apartheid regime. Serious findings were made against specific corporations.[200] The TRC also suggested the existence of legal grounds for instituting a claim for reparations based on the enforceability of contracts that had been contrary to public

[192] Ibid., para. 12.
[193] Cites in I Evans, 'Multinationals face damages claim from victims of apartheid', The Observer, 18 May 2008.
[194] Brief of Amici Curiae Commissioners and Committee Members of South Africa's Truth and Reconciliation in Support of Appellants, United States Court of Appeal for the Second Circuit, 30 August 2005, 1–2.
[195] 16
[196] Ibid., 14.
[197] Ibid., 15-16.
[198] Cited in South African Press Association, 'Some Glaring Absences in Business Submissions to TRC: Tutu' 11 November 1997.
[199] International Center for Transitional Justice, 'Brief of *Amicus Curiae*' in the United States Court of Appeals for the Second Circuit, 30 November 2009.
[200] TRC of South Africa (n 174), Volume IV, Chapter II, 144, 151-155.

policy.[201] The TRC report stated that, going forward, there were 'legal grounds for instituting claims for reparations against banks and other corporations'.[202] Although the TRC provided little clarification of the type of legal mechanisms it was referring to, it appeared clear that some form of legal proceedings was considered valid.[203] The Commission acknowledged that the scope of its findings regarding business involvement was limited, and left the door open for future proceedings. The *Apartheid Litigation* drew significantly on the work of the TRC in terms of the factual findings made against companies and the Commission's articulation of legal responsibility.[204] Indeed, the *Apartheid Litigation* needs to be understood as 'a logical continuation of the outcome of the TRC'.[205] With it victims extended efforts in South Africa to hold corporations accountable beyond the truth-seeking process.

In 2009, after the decision in the district court, the government changed its view and announced its support of the lawsuit, withdrawing its previous opposition. The South African Justice Minister sent a letter to the District Court judge informing her that the government believed the court to be the appropriate forum to decide this case.[206] This change was also linked with a new economic policy based on state-led development, and not only on free market practices.[207] The *Apartheid Litigation* illustrates the consequences of the political tensions between justice and reconciliation with regard to corporations.[208] Ruben Carranza argues that the failure of transitional justice in South Africa to hold corporations accountable was inherent in the design of the South African transitional justice model, animated as it was, by a spirit of 'reconciliation'.[209] Some scholars saw the *Apartheid Litigation* as an opportunity for some companies to prove that they were not complicit in apartheid, and to be free of any such stigma in the international community.[210] In this regards, however, the litigation did little

[201] Ibid., 146-47.
[202] Ibid. See also, M Seekoe, 'Reparations', in C Villa-Vicencio and F du Toit (eds.), *Truth and Reconciliation in South Africa: 10 Years On* (New Africa Books 2006), 36.
[203] TRC of South Africa (n 174). See also, Abrahams (n 173), 158-62.
[204] AR Chapman and H van der Werwe, 'Reflections on the South African Experience' in AR Chapman and Hugo van der Werwe (eds.), *Truth and Reconciliation in South Africa; Did the TRC Deliver?* (University of Pennsylvania Press 2008), 286.
[205] C Abrahams, 'The TRC's Unfinished Business: Reparations', in Villa-Vicencio and du Toit (n 202), 34, 36.
[206] Minister Justice and Constitutional Development. 'Re South African Apartheid Litigation' (MDL 1499).
[207] Abrahams (n 173), 176-80.
[208] Abrahams, 'The TRC Unfinished Business' (n 205), Abrahams (n 173), 158-62.
[209] R Carranza, 'Transitional Justice, Corporate Responsibility and Learning from the Global South' 28 April 2015 <http://jamesgstewart.com/transitional-justice-corporate-responsibility-and-learning-from-the-global-south/?subscribe=success#blog_subscription-2> (accessed 10 September 2017).
[210] Simcock (n 182), 242, 249-53.

in terms of establishing the role of business in apartheid.[211]

After years of proceedings, the claims were first narrowed to proceed only against *Daimler*, *Ford*, *General Motors*, *IBM*, and *Rheinmetall*, and then allowed only against *IBM* and *Ford*.[212] The court dismissed aiding and abetting claims against the banks. It dismissed, for example, the claims against *Barclays* and *UBS* for loaning money to the South African government.[213] It based its decision on the grounds that commercial loans were too far removed from human rights violations carried out by their recipients for a legally relevant link to exist.[214] The court considered that 'simply doing business with a state or individual who violate the law of nations is insufficient to create liability under customary international law'.[215] As a consequence, the only claims that remained were those where the court found that the goods and services provided by the defendant corporation had provided the direct means for carrying out the violations, such as the sale of vehicles with military specifications or the design of computer software to implement policy of geographical segregation and racial discrimination.[216] For example, the court allowed the case to go forward and be heard against IBM for providing computers and software to the apartheid regime, charging that it had helped to implement a 'de-nationalization' policy against black South Africans.[217] The plaintiffs later reached a settlement with *General Motors*. In 2015, the case was dismissed because, after the decision in *Kiobel*, the connection with the United States was not sufficient to warrant the case being heard in US courts.[218]

The issue of corporate complicity was discussed during the litigation. On appeal to the Second Circuit, Judge Korman (dissenting) regarded the complaints as being about nothing other than condemning the defendants for having done business with the apartheid regime,[219] something that it itself would not be sufficient to trigger legal liability for complicity:

[211] Abrahams (n 173).
[212] *South African Apartheid Litigation* (n 176).
[213] Ibid., Judge Scheinlin.
[214] Ibid., 269.
[215] Ibid., 257, Judge Sprizzo.
[216] Ibid., 264-66. See also, Abrahams (n 173), 162-67; Michalowski (n 176).
[217] *South African Apartheid Litigation* (n 176), 265.
[218] Ibid.
[219] Ibid., 294, Judge Korman (dissenting).

> [I]t is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal. Aiding a criminal "is not the same thing as aiding and abetting [his or her] alleged human rights abuses".[220]

The original complaints in the *Apartheid Litigation* requested damages and also sought broad equitable relief, for example the institution of affirmative action education and training programmes.[221] But because of the nature of the ATS, the *Apartheid Litigation* aimed to provide exclusively monetary reparations to victims seeking punitive as well as compensatory damages. To that end, the litigation was aligned with the TRC's desire to leave civil obligations intact, and also with the Committee's ultimate decision to provide monetary compensation to victims, as the preferred form of reparation.[222] The South African government originally opposed the litigation, asserting that reparations should be addressed through a broad programme of socio-economic transformation.[223]

In the end, the Apartheid litigation did not compensate the victims in the way they hoped. As seen, the claims were dismissed and only one of the corporations involved, *General Motors*, agreed to a settlement in 2012, ten years after the beginning of the litigation. It agreed to pay $1.5 million in shares in the company without acknowledging responsibility for apartheid crimes. The shares were to be placed into a trust fund and converted into money to be shared between the 25 plaintiffs and the Khulumani support group. The positive aspect of this approach is that the beneficiaries were not limited to the plaintiffs in the case, but also included victims more generally, such as those who may have been equally harmed but did not meet the requirements to qualify as plaintiffs in the lawsuit.[224] There are important lessons from this case, in particular in relation to the debate on the role of financial actors and their potential responsibility for complicity in gross human rights violation.

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[220] Ibid., 257.
[221] Gubbay (n 176), 345.
[222] Simcock (n 182), 259-60.
[223] Hausfeld LLP, 'South African Government withdraws opposition to apartheid lawsuits pending in U.S. federal court', 3 September 2009.
[224] C Sandoval and G Surfleet, 'Corporations and Redress in Transitional Justice Processes' in Michalowski (n 61), 107.

Financial Complicity

The *Apartheid Litigation* decision draws a distinction between the provision of goods or commodities and the provisions of loans or financial contributions. Without doing an analysis of the concrete effect of the loans, the ruling established that funds could never be sufficiently connected to the crimes, because they are not 'lethal commodities'.[225] Julian Simcock argues that the decision of the *Apartheid Litigation* to narrow the claims is in line with the TRC's 'closed list' approach, when it established the requirements for reparation eligibility and that limiting complicity liability to instances in which the corporation contributed some form of substantial assistance is also in line with the TRC's efforts to stratify degrees of corporate involvement.[226] According to Bohoslavky and Opgenhaffenv, instead, this differentiation, which focuses on the intrinsic qualities of the goods rather than assessing the provisions' use and impacts, used a confusing rationale:

> On one hand, it accepted that the computers provided by IBM to the apartheid regime were "sufficiently risky" commodities in their connection to aiding in the denationalization of black South Africans, thus contributing to the State's crimes. Simultaneously, however, the court asserted that even lethal gas could be used in some cases for so-called legitimate purposes.[227]

The *Apartheid Litigation* ruling, which denied that financial assistance could contribute to or facilitate human rights abuses, represents a conservative and narrow interpretation of previous developments in international law with regard to corporate complicity, particularly for financing *ius cogens* violations.[228] The view of the court was that money is inherently neutral and loans are always too far removed from the violations carried out by their recipients. In its decision, the court, using the 'inherent quality' of the commodities as its criterion, made a distinction between an agent like poison gas being provided to a regime (referring to the *Zyklon B* case) and a fungible resource, like finance or investment (referring to the *Ministries*

[225] *South African Apartheid Litigation* (n 176).
[226] Simcock (n 182), 254-55, 257.
[227] Bohoslavky and Opgenhaffenv (n 80), 177.
[228] JP Bohoslavsky and M Rulli, 'Corporate Complicity and Finance as a "Killing Agent": The Relevance of the Chilean Case' (2010) 8 JICJ 8 829, 830, 836, 838, 840, 847.

case), which it felt did not meet the legal standards for responsibility in this case.[229] The court decided when analysing the *actus reus* component that loans could not empirically be sufficiently connected to the crimes in question.[230]

The criterion of 'inherent quality' seems to ignore the very definition of money as a good that acts as a medium of exchange in transactions, a unit of account, and a store of value.[231] Money allows its holder to do something by virtue of its purchasing power. Therefore, what is crucial is what the holder will do with it and this is the point where the foreseeable consequences of giving money to someone enter into play. By dismissing the claims against the banks, the *Apartheid Litigation* implies immunity for banks from the consequences of their actions.[232] The decision creates an exemption for commercial lenders from complicity liability, without the requirement of a case-by-case analysis or an examination of the lender's *mens rea*.

The court relied on the *Ministries* case as the sole authority in support the rejection of complicity liability for commercial loans, but developments in international law do not justify such conclusion.[233] Since the Nuremberg trials, international law developed considerably the notion of accomplice liability in international criminal law and denunciation of financing human rights abuses.[234] Particularly instructive in this respect is the decision in *Almog v. Arab Bank*.[235] The plaintiffs alleged that *Arab Bank* 'aided and abetted, was complicit in, intentionally facilitated, and participated in a joint venture to engage in acts of genocide in violation of the laws of nations by providing financial and other practical assistance…to HAMAS'.[236] With regard to the question of whether routine banking activities can give rise to complicity liability, the court sustained that: 'acts which in themselves may be benign, if done

[229] S Michalowski and JP Bohoslavsky, 'Ius Cogens, Transitional Justice and other Trends of the Debate on Odious Debts. A Response to theWorld Bank Discussion Paper on Odious Debts' (2010) 48 Columbia J Transnatl L 61.
[230] *South African Apartheid Litigation* (n 176), 70.
[231] Bohoslavsky and Rulli (n 228), 835.
[232] Bohoslavky and Opgenhaffenv (n 80), 159.
[233] Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, 478 (Nuernberg Military Tribs 1950).
[234] Eg *Unocal* (n 114), 395 F.3d 932 (9th Cir. 2002); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003). See also, SW Scott, 'Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atrocities' (2005) 89 Minn L Rev 1497, 1533-34.
[235] *Almog v. Arab Bank* (n 140) 471 F. Supp. 2d 257 (E.D.N.Y. 2007).
[236] Ibid.

for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts'.[237]

The commission of international crimes, which by definition are large scale, requires finance to pay for the equipment and human resources crimes of that magnitude entail.[238] Lenders that provide funds used to finance international crimes are often banks and other private financial entities, and gains from those crimes are often deposited in private banks.[239] As Anita Ramasastry puts it, 'What do Hitler and Marcos have in common? Their bankers. Both leaders used numbered Swiss accounts in order to deposit ill-gotten gains'.[240] Already in 1978, Antonio Cassese had prepared a report, commissioned by the then UN Commission on Human Rights, on the role played by lenders in Chile during the Pinochet dictatorship.[241] The 'Cassese Report' explained in detail how the financial aid received by the regime facilitated human rights abuses in Chile.[242] In his 260-page report, Cassese developed a sophisticated methodology to evaluate the impact of the financial aid on the human rights situation, concluding,

> As foreign economic assistance largely serves to strengthen and prop up the economic system adopted by the Chilean authorities, which in its turn needs to be based on the repression of civil and political rights, the conclusions warranted that the bulk of present economic assistance is instrumental in consolidating and perpetuating the present repression of those rights.[243]

But, as Bohoslavsky and Rulli point out, the Cassese Report was 'inexplicably ignored for decades by those engaging in the corporate complicity debate'.[244] Financial complicity in international crimes and gross human rights abuses is extremely difficult to establish.

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[237] Ibid., 471 F. Supp. 2d 291-92 (E.D.N.Y. 2007).
[238] N Bernaz, 'Establishing Liability for Financial Complicity in International Crimes' in Bohoslavsky and Letnar Černič (176), 61.
[239] For example, in 2016, victims of the Sudanese government filed a class action lawsuit against BNP Paribas accusing the bank for complicity in government's persecution.
[240] A Ramasastry, 'Secrets and Lies? Swiss Banks and International Human Rights' (1998) 31 Vand J Transnatl L 325, 328
[241] A Cassese, 'Study on the impact of foreign Economic Aid and Assistance on Respect for Human Rights in Chile', E/CN.4/Sub.2/412, 1978 (Vol. I-IV).
[242] Ibid.,Vol. I, 3, 18.
[243] Ibid.,Vol IV, 24.
[244] A. Cassese, 'Foreign Economic Assistance and Respect for Civil and Political Rights: Chile - A Case Study' (1979) 14 Texas Intl LJ 251, 251-53. See also, Bohoslavsky and Rulli (n 228), 830, 836, 838, 840, 847.

Establishing liability in law, civil or criminal, requires a careful examination of causation and other key elements such knowledge or at foreseeability, and proximity.[245] Even if it is recognised that corporations can be held accountable for complicity, there remains confusion about the scope of this responsibility and its broader implications.[246]

For example, one question that may arise is whether investors may bear secondary responsibility for human rights violations committed using funds they have provided. The challenge in specific cases is to determine when neutral business activities, such as providing goods or financial resources, have turned into legally relevant behaviour and thus become an act of complicity with the perpetrator. Michalowski points out that in the context of financing, there is a need for analysis of the *actus reus* and causation elements of complicity liability.[247] The international standard defining the *actus reus* of liability in international law,[248] which is consistently applied by US courts in the context of corporate complicity liability[249] and widely accepted in the relevant academic literature,[250] is that of 'practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime'.[251] The assistance 'need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal'.[252] Instead, it is sufficient that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Further, *Mastafa v. Australian Wheat Board Limited and Banque Nationale De Paris Paribas*, a case on corporate complicity brought under the ATS, describes the relevant standard as follows:

> It is not enough that a defendant provides substantial assistance to a tortfeasor; the 'substantial assistance' must also 'advance the [tort's] commission'…providing the Hussein regime with funds-even substantial funds-does not aid and abet its human rights abuses if the money did not advance the commission of the alleged human rights

[245] International Commission of Jurists, *Corporate Complicity and Legal Accountability* (n 2), Vol I, 8.
[246] Bohoslavky and Opgenhaffenv (n 80), 159.
[247] Michalowski, 'No Complicity Liability' (n 176).
[248] Report of the International Law Commission, Article 2(3)(d) of Draft Code of Crimes against the Peace and Security of Mankind, U.N. GAOR, 48th Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996).
[249] See, for example, *Khulumani* (n 140); *Talisman Energy* (n 114), 324; *Almog v Arab Bank* (n 140), 287; *South African Apartheid Litigation* (n 176), 257.
[250] A Clapham and S Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2011) 24 Hastings Intl Comp L Rev 339, 344; D Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6 Northwestern Univ J Intl Human Rights 304, 16; Ramasastry, 'Corporate Complicity' (n 32), 143. International Commission of Jurists, *Corporate Complicity and Legal Accountability* (n 2), Vol II, 17.
[251] *Prosecutor v Furundzija* (Case No: IT-95-17/1-T), 235.
[252] Ibid., 209.

abuses. This does not mean that plaintiffs must allege that the particular funds provided were used to commit the abuses, or that without the funds the Hussein regime would not have been able to commit such abuses, so long as the assistance is 'a substantial factor in causing the resulting tort'.[253]

The International Commission of Jurists has developed some helpful criteria to distinguish corporate complicity in international crimes from neutral business activity.[254] It considered that the 'liability of a financier will depend on what he or she knows about how his or her services and loans will be utilised and the degree to which these services actually affect the commission of a crime'.[255] This distinction becomes relevant when companies facilitate state-sponsored human rights abuses by providing the means to commit these violations. A similar principle has been expressed by an US court in *Almog v Arab Bank*.[256] With regard to the question of whether routine banking activities can give rise to complicity liability, the Court sustained that 'acts which in themselves may be benign, if done for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts'.[257]

According to Kaleck and Saage-Maab, in cases that concern neutral business actions, a line must be drawn between the morally condemnable behaviour of 'doing business with the devil' and criminally relevant contributions to another actor's international crimes.[258] They argue that it is necessary to make the distinction between the supply of goods that are dangerous *per se*, such as weapons, and the supply of goods that may only contribute, in a certain scenario, to the commission of international crimes, such as computer programmes or certain chemicals.[259] Talking about the liability of the funders of international crimes, such as banks and other financial institutions, Ingrid Gubbay recognises that 'the legal theory about financing human rights violations is still in its early days'.[260] Indeed, there are many unresolved questions in this area, including how to distinguish between 'doing business' and 'being complicit', and whether the purpose for which the loan was granted should make a difference. It seems clear

[253] Mastafa v. Australian Wheat Board Limited and Banque Nationale De Paris Paribas 2008 WL 4378443 (S.D.N.Y.).
[254] International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), Vol I, 9.
[255] Ibid., 39-40.
[256] *Almog v. Arab Bank* (n 140).
[257] Ibid., 291.
[258] Kaleck and Saage-Maab (n 33), 719-21.
[259] Ibid.
[260] Lecture by I Gubbay (n 128).

that simply 'doing business' would not entail liability, as 'international law does not impose liability for declining to boycott a pariah regime'. Moreover, as Gubbay emphasized, 'aiding a criminal is not the same as aiding and abetting their crimes'.[261]

A number of scholars have made a solid case for reconsidering complicity liability of lenders in gross human rights violations.[262] In particular, Juan Pablo Bohoslavsky strongly argues for the liability of those who grant loans despite being aware that this money would contribute to commission of human rights abuses and crimes under international law.[263] Bohoslavsky and Verbitsky's book *Cuentas Pendientes* ('Outstanding Debts') examines the role of foreign financial institutions and their potential complicity in supporting the Argentina's regime.[264] The authors advocate a national truth commission to investigate corporate financial support of the dictatorship, arguing that the dictatorship could not have existed or carried out the repression without corporations' direct and indirect involvement.[265] They suggest that the assistance provided by private financial institutions played a role in the dictatorship significant enough to warrant possible future legal action on the basis of complicity in crimes against humanity.[266] Chapter IV analyses this proposal and its outcomes.

There are several factors that render the act of scrutinizing companies responsibility relevant. For example, if it is determined that the banks are liable, this could provide an additional source of funding for reparations to victims and their families.[267] Further, according to Bohoslavsky and Opgenhaffen,

> A thorough examination of the banks' behaviour would create recognition of the idea that financial support can be as powerful a legitimating and strengthening tool as other types of assistance to regimes known to violate human rights. This could create precedent to subject other financial institutions to the same kind of scrutiny in the

[261] Bernaz (n 241).
[262] Michalowski (n 176), 453-54; Bohoslavsky and Opgenhaffen (n 80), Bohoslavsky and Rulli (n 228); Z Miller 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 Intl J Trans J 266-91; C Acuña, 'Transitional Justice in Argentina and Chile: A Never Ending Story?' in J Elster (ed.), *Reparation and Retribution in the Transition to Democracy* (Columbia University Press 2006), 223.
[263] Bohoslavsky and Opgenhaffen (n 80), 175.
[264] JP Bohoslavsky and H Verbitsky, *Cuentas Pendientes* (Siglo Ventiuno Editores 2015).
[265] Ibid.
[266] Bohoslavsky and Verbitsky (n 264). See also, Bohoslavsky and Opgenhaffen (n 80), 185.
[267] Bohoslavsky and Opgenhaffen (n 80).

future, which may serve as an overall deterrent effect on corporate behaviour.[268]

While there is no international case law and no consensus on mechanisms to hold financial backers of international criminals liable for their role, there are at least three options to legally address the consequences of financing gross human rights violations or crimes under international law.[269] An option is to challenge the validity of the loan, which is related to the 'odious debt' debate.[270] A second option is to demonstrate civil responsibility for financial complicity.[271] Finally, another option is to prove the criminal responsibility of the financial accomplices.[272] One of the rare examples of the latter is the on-going lawsuit against *BNP Paribas*, France's largest bank. On 29 June 2017, three human-rights groups in France submitted a complaint to a French judge accusing *BNP Paribas* of war crimes and complicity in genocide in Rwanda in 1994.[273] The groups claim that *BNP* transferred $ 1.3 millions from the Rwandan national bank to a Swiss account belonging to a South African arms dealer in June 1994, a month after the UN had implemented an arms embargo.[274] According to the complaint, the alleged transfer of funds allowed for 80 tonnes of weapons to be sold to Hutu colonel Theóneste Bagosora, a key player in the genocide. The ICTR found him guilty of genocide and other crimes in 2008.[275] This complaint represents a first against a bank in France.[276]

Odious Debt

'Odious debt' is a private-law doctrine whose core addresses debts incurred by despots, without the consent of their subjects, for corrupt purposes that are not in the interests of the population.[277] These debts are 'odious' because they are secured by the resources of

[268] Ibid., 197-201.
[269] Bernaz (n 241), 62-63.
[270] S Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective* (Routledge 2007); LC Buchheit, G Mitu Gulati, and RB Thompson, 'The Dilemma of Odious Debts' (2007) 56 Duke LJ 1201; A Ramasastry, 'Odious Debt or Odious Payments? Using Anti-Corruption Measures to Prevent Odious Debt' (2007) 32 NC J Intl L Com Reg 819.
[271] Bohoslavsky and Opgenhaffen (n 80), at 159-85.
[272] C Chiomenti, 'Corporations and the International Court', in O de Schutter (ed.), *Transnational Corporations and Human Rights* (Hart 2006), 287.
[273] The Economist, 'BNP Paribas faces accusation over the Rwanda genocide', 8 July 2017.
[274] Ibid.
[275] ICTR, *The Prosecutor v. Bagosora et al.*, 18 December 2008, Case no. ICTR-98-41-T, para 2266, part 3.1, 571.
[276] Ibid.
[277] A Sack, 'Les Effets Des Transformations Des Etats Sur Leurs Dettes Publiques Et Autres Obligations Financières' (1927) Recueil Sirey 157.

subjugated people who enjoy no benefit from the financial commitments made by illegitimate leaders.[278] Despite this, the rules of state succession require a new state to repay debts incurred by its predecessor, even if they were used to perpetuate oppression. The sense of moral indignation that such result inspires is the driving force behind the doctrine of odious debt. Thus, principles of contract and agency prevent the burden of the debt from falling on those who did not consent or did not receive consideration.[279]

While few authors expressly refer to concepts of transitional justice when discussing this particular feature of odious debts,[280] the issue of odious debts frequently arises in transitional situations. To investigate the history of these debts and their role in contributing to the commission of human rights violations may contribute to achieving some of the goals of transitional justice.[281] The ability of a state in transition to void debts associated with past atrocities also appears to promise a number of benefits in relation to the governments being able to free resources for reparation, reform, reconstruction, and restitution.[282] Arguably, accepting the responsibility of business for human rights violations may provide a basis for a theory of 'odious profit', which borrows from the concept of odious debt: business should account for profits accumulated through their relationships with illegitimate regimes.[283]

David Gray argues that in many circumstances, full faith in truth and accountability will require that transitional regimes accept the burden of financial obligations incurred by an odious predecessor.[284] He argues that this would reinforce assignments of liability to international investors and debtors who supply financial support to odious regimes.[285] His central claim is that expansion of the odious debt doctrine to cover all debts of an odious

[278] DC Gray, 'Devilry, Complicity, and Greed: Transitional Justice and Odious Debt' (2007) 70 Law Contemp Probs 137, 150.
[279] Sack (n 277).
[280] Gray, 'Devilry, Complicity, and Greed'(n 278), 137; Michalowski and Bohoslavsky (n 229), 92; A Gelpern, 'Sovereign Debt Restructuring: What Iraq and Argentina Might Learn from Each Other' (2005) 6 Chi J Intl L 391.
[281] L Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 Intl J Transitional Just 331; R Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 Intl J Transitional Just 310; Miller (n 262).
[282] D Gray, 'An Excuse-Centered Approach to Transitional Justice' (2006) 74 Ford L Rev 2621, 2624-29.
[283] BS Lyons, 'Getting to Accountability: Business, Apartheid and Human Rights' (1999) 17 Neth Q Hum Rts 135, 159-60
[284] Gray, 'Devilry, Complicity, and Greed'(n 278), 137.
[285] Ibid., 138, 145, 147, 150.

regime fails to account for the full truth about the past, and compromises transitional justice priorities of accountability.[286] Gray argues:

> Voiding a debt as odious effectively puts all the blame for past wrongs on the shoulders of a few elites who are made to bear as personal both the weight of the debts and the weight of blame for past wrongs, providing a free pass for those whose complicity is ignored and for corporations, banks, and other investors who have a share of the responsibility.[287]

By contrast, Michalowski and Bohoslavsky put forward the argument that debts can be void if they violate *ius cogens* norms.[288] Lender awareness is clearly relevant, as the purpose of preventing *ius cogens* violations by deterring lenders from making money available to this effect can only be achieved where creditors have a clear idea of the situations in which this consequence might arise, and which they therefore need to avoid.[289] It is, however, sufficient, according to Michalowski and Bohoslavsky, that lenders could or should have known of the use of the loan by the borrowing regime, whereas it is irrelevant whether they shared this purpose.[290]

An example of how the *ius cogens* approach can be applied in practice is that of the debts taken up by the Argentina military regime. An argument for a partial repudiation of Argentina's debt is that the loans were made to a regime that violated *ius cogens* norms, and that the incoming funds contributed to the growing expenditures of the military apparatus that perpetrated these violations.[291] Claims for civil remedies presented in a federal court in Buenos Aires against financial institutions because of their complicity with the crimes committed by the junta might shed more light on these issues, as they raise some of the questions that are essential in the context of a *ius cogens* based odious debts doctrine.[292] In 2009, a civil suit was filed in Buenos Aires on behalf of five victims of the Argentina dictatorship against a number of banks accused of complicity with human rights abuses for

[286] Ibid., 155, 160, 164.
[287] Ibid., 161
[288] Michalowski and Bohoslavsky (n 229), 69.
[289] Ibid.
[290] Ibid., 80.
[291] Ibid., 83.
[292] eg, *Ibañez Manuel Leandro and others v. Undetermined financial institutions*, Juzgado Civil y Comercial Federal no 7 Sec 14, Buenos Aires.

financing the military junta.[293] The *Ibañez Manuel Leandro and others v. Undetermined financial institutions* case is a rare example of a civil claim over financial complicity filed in the country where abused allegedly occurred.

Between March 1976 and December 1983, several commercial banks lent funds to the regime in Argentina. The claim alleged that the financing of the regime facilitated the commission of grave human rights violations, characterized as crimes against humanity, against the civil population, including the plaintiffs.[294] The claim argued that due to the public character of the human rights abuses in Argentina, banks were aware of the potential and foreseeable consequences of lending money to the regime.[295] An *amicus curiae*, field in support of the plaintiffs argued that while the defendant banks did not directly participated in the crimes, they met the requirements of liability, in that they participated as accomplices in the crimes committed by the regime and that caused harm to the plaintiff with the requisite *mens rea*, and their contribution was not too remote. [296]

In line with the international standard defining the *actus reus* of liability in international law,[297] it is not necessary that without the contribution of the banks, the regime could not have committed the violations, but rather simply that the banks played an influential role and that without the loans, the military regime would not have been able to carry out its human rights violations in the same way, for example in the same intensity and over the same period of time. Applying the relevant provisions of Argentinean law in light of international principles and standards, it appears that the banks were complicit in the crimes committed by the Argentina military junta. The question of corporate complicity liability in gross human rights violations has arisen mainly in litigation before the ATS and a number of cases have defined the *mens rea* standard of such liability.[298] The Marcos and Holocaust cases in particular are important in

[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Essex University and Centro de Estudios Legales y Sociales, *Amicus Curiae* presented before the Juzgado Civil y Comercial Federal nº 7 Sec 14, in the case of *Ibañez Manuel Leandro and others v. Undetermined financial institutions*, 26 March 2010, 1-26.
[297] Report of the International Law Commission, Article 2(3)(d) of Draft Code of Crimes against the Peace and Security of Mankind, U.N. GAOR, 48th Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996).
[298] *Talisman Energy* (n 114) (suggesting a move from a mens rea standard of knowledge to one of primary purpose, which would considerably reduce the possibility of successful litigation against corporations); *Exxon Mobil* (n 114) (holding that Talisman was wrongly decided and that the mens rea standard in international law is that of knowledge); *Kiobel* (n 143) (2d Cir. 2010). See also, V Nerlich, 'Core Crimes and International Business Corporations' (2010) 8 JICJ 895; Ku (n 156); LJ Dhooge, 'Accessorial Liability of Transnational Corporations

that they attempt to challenge the role that commercial banks play with respect to international human rights. In both instances, plaintiffs challenge the assertions that banks are always neutral actors engaged in purely commercial activities.[299]

Marcos Litigation

In 1986, eight Filipinos residents in the United States filed a lawsuit in Hawaii over abuses committed by the Marcos government.[300] The suit was filed while Marcos and his entourage were fleeing Manila and were en route to Hawaii after a democratic uprising forced them to leave the Philippines.[301]The plaintiffs sought compensation for torture, summary execution, disappearance, and arbitrary detention.[302] Marcos died in Hawaii in 1989, but the litigation continued against his estate. In 1995, after receiving a $1.9 billion judgment, the plaintiffs tried to gain access to an estimated $475 million that Marcos had deposited in Swiss accounts.[303] At that point the plaintiffs, who had not initially named the Swiss banks as defendants, alleged that the banks had done more than accept funds: they had actively helped Marcos conceal his wealth.

In 1996, the court ordered the Swiss banks to hand over the Marcos accounts in partial satisfaction of the $1.9 billion judgment. [304] The court found the Swiss banks to be 'agents and representatives' of the Marcos estate and authorized a permanent injunction as to the assets held by the banks.[305] The Marcos litigation does not contain detailed accounts of the role of the Swiss banks because the banks were not initially named as defendants. The litigation is instructive, nonetheless, because it is the first to characterize Swiss banks as agents and

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Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank' (2009) 18 Transnatl L Contemp Probs 247, 280-81.

[299] Ramasastry, 'Secrets and Lies?' (n 241), 449.

[300] *In re Ferdinand Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1469 (9th Cir. 1994), 94 F.3d 539, 542 (9th Cir. 1996) [*Marcos Litigation*]. Five cases were filed against Marcos and were eventually consolidated: *Clemente v. Marcos*, 878 F.2d 1438 (9th Cir. 1989); *Hilao v. Marcos*, 878 F.2d 1438 (9th Cir. 1989); *Ortigas v. Marcos*, 878 F.2d 1439 (9th Cir. 1989); *Sison v. Marcos*, 878 F.2d 1438 (9th Cir. 1989); *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989). See also, RG Steinhardt, 'Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos' (195) 20 Yale J Intl L 65 (1995).

[301] Marcos Litigation (n 300).

[302] Ibid., 94 F.3d 539, 542.

[303] Ramasastry, 'Secrets and Lies?' (n 241), 430-33.

[304] *Marcos Litigation* (n 300), 910 F. Supp. 1470, 1473 (D. Haw. 1995).

[305] Ibid. The Ninth Circuit, while acknowledging the district court judge's characterization of the banks as 'agents' of Marcos, reversed the decision because the banks were not parties in the original lawsuits, *Hilao v. Estate of Marcos*, 95 F.3d 848, 855 (9th Cir. 1996)).

facilitators in an ATS lawsuit.[306] The decision to subject the banks to the worldwide injunction and to vest title with the bank accounts in the Marcos plaintiffs' attorneys demonstrates a view that the banks were not just repositories of wealth, but entities that had played a more active role for their client.[307]

Holocaust Reparation Lawsuits

After World War II, the Allies had agreed not only to punish war criminals, but also to implement reparations.[308] The Allied Control Council ordered the dissolution of certain corporations and the seizure of their assets.[309] For example, *I.G. Farben* received the ultimate administrative sanction when the Control Council ordered its dissolution, 'the equivalent of the corporate death penalty', as Giannini and Farbstein put it.[310] *Control Council Law No. 9* ordered that important *I.G. Farben* assets, including some plants, be destroyed.[311] The Council also included provisions related to the distribution and payment of reparations.[312] In the end, however, the tensions between the goals of reconstruction, reparations, securing political alliances, and unification were incompatible, and reparation efforts ended.[313] By mid-1946, when decisions about war crimes in which business played a role were being reached, the Allies had concluded that political and economic stability could only be achieved with the participation of German industry run by the same managers, regardless of culpability.[314] Companies had long rejected legal claims by slave labourers, insisting that the German government, as successor to the Third Reich, should pay any damages.[315] While the government paid out over DM80 billion to victims of the Nazis, German companies paid

[306] Ramasastry, 'Secrets and Lies?' (n 241), 430-35.
[307] Ibid., 449-50.
[308] Bush (n 115), 1119.
[309] Control Council Law No. 9, art I, 225 (ordering dismantling of I.G. Farben as well as seizure of its assets: 'All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie A.G., are hereby seized by and the legal title thereto is vested in the Control Council'); Control Council Law No. 57, Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front (Aug. 30, 1947), in VIII Enactments and Approved Papers of the Control Council and Coordinating Committee 1, (ordering seizure of insurance company assets).
[310] T Giannini and S Farbstein, 'Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights' (2010) 52 HILJ 129.
[311] Control Council Law No. 9, art. III(b), 226 (providing for 'destruction of certain plants').
[312] Ibid,, art. III, III(a), at 225–26.
[313] Bush (n 115), 1120.
[314] Ibid., 1122.
[315] BB Ferencz, *Less Than Slaves: Jewish Forced Labor And The Quest For Compensation* (Indiana University Press 1979), xvii; MJ Bazyler, 'Nuremberg in America: Litigating the Holocaust in United States Courts' (2000) 34 U Rich L Rev 1, 31-39, 191-92; The Economist, 'Companies and the Holocaust: Industrial Actions', 14 November 1998, 75; E Black, *IBM and The Holocaust: The Strategic Alliance Between Nazi Germany and America's Most Powerful Corporation* (Crown Books 2001).

almost nothing.[316] Only a few - most significantly *Farben* - paid small reparations amounts.[317] Monies and assets that had been seized in the United States during the war were returned to the companies in whole or part, notably in the high-profile settlement involving *GAF*, the *Farben* successor *Interhandel*, and the United States government. Flick, described as one of the two richest men in Germany and the owner of hundreds of companies, paid nothing. The richest man, Alfried Krupp, with his property restored in full, was instructed to pay an average of $825 per slave labourer to a small percentage of his former labour pool.[318]

In the 1990s, the issue of reparation for slave labour practices in Nazi Germany gained momentum with a series of lawsuits brought in the United States.[319] Hundreds of Holocaust survivors and relatives of Holocaust victims filed several class action lawsuits in US federal courts against Swiss banks in an effort to recover money deposited in bank accounts prior to and during World War II.[320] Joined in these lawsuits were Holocaust survivors who were forced by the Nazis to engage in slave labour, and survivors and the heirs of Holocaust victims who had property looted by the Nazis.[321] Plaintiffs alleged that Swiss banks knowingly accepted profits derived from slave labour as well as looted assets, and claimed that the banks actively financed such efforts.[322] The Swiss banks were alleged to have violated 'international treaties, customary international laws, and fundamental human rights laws'.[323]

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[316] J Authers, 'Making Ggod Again: German Compensation for Forced and Slave Laborers' in de Greiff (n 97), 420.

[317] After almost two decades of congressional and courtroom battles, the valuable Farben assets that were held in the United States by the Alien Property Custodian were returned to the German or Swiss claimants, J Borkin, *The Crime and the Punishment of I.G. Farben* (The Free Press 1978), 200-22.

[318] The provisions of Control Council Law No. 27, under whose terms the Krupp empire would be split, were renegotiated and suspended. A Home, *Return to Power* (1956), 106-19.

[319] See C Goschler, 'German Compensation to Jewish Nazi Victims after 1945' in P Hayes and JM Diefendorf (eds.), *Lessons and Legacies VI: New Currents in Holocaust Research* (2004), 373; A Colonomos and A Armstrong, 'German Reparations for the Jews after World War II: A Turning Point in the History of Reparations' in de Greiff (n 97), 390; Bazyler (n 314), 31-39 (2000).

[320] *Weisshaus v. Union Bank of Switz.*, No. 96-CV-4849 (E.D.N.Y. Oct. 3, 1996) (Am. Compl. Jan. 24, 1997); *Friedman v. Union Bank of Switz.*, No. 96-CV-5161 (E.D.N.Y. Oct. 21, 1996) (Am. Compl. 1997); *World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switz.*, No. 97-CV-0461 (E.D.N.Y. Jan. 29, 1997) (Am. Comp. July 1997) [*Holocaust Litigation*]. See also, L Bilsky, 'Transnational Holocaust Litigation' (2012) 23(2) Eur J Int Law (2012) 349; Black (n 314); Ferencz (n 314), xvii; Bazyler (n 314), 191-92, 207, 249-55.

[321] *Holocaust Litigation* (n 320).

[322] Ibid. See also C Simpson (ed.),*War Crimes of the Deutsche Bank and the Dresdner Bank* (Holmes & Meyer 2002), 1-34. Friedman v. Union Bank of Switz., No. 96-CV-5161 (E.D.N.Y. Oct. 21, 1996); Bazyler (n 315) 31-39, 93-136, 237-49.

[323] *Friedman v. Union Bank of Switz*, No. 96-CV-5161, 215 (E.D.N.Y. Oct. 21, 1996). See also, Ramasastry, 'Secrets and Lies?' (n 241), 350-72.

The Holocaust claims evoked a number of criticism specifically as to the characterization of banks as collaborators. Walter Rockler, an American prosecutor at Nuremberg responsible for prosecuting the two German bankers Karl Rasche and Emil Puhl, asked:

> The charge that Swiss banks accepted moneys looted by the Nazis is probably true. So did French banks, Italian banks, Swedish banks. And so would any other banks, including American and British banks, were these countries not at war with the Nazis. A substantial aspect of the business of banking for profit is acceptance of deposits without regard to the history of the money being deposited. Swiss bankers are not unusual in this practice...[I]n the matter of the claims or survivors to deposits of the murdered persons in Swiss banks, the Swiss bankers seem to have behaved badly, but like bankers. They would not part with the money except upon strict proofs-proofs that of course were not available anywhere. As to many of these accounts, there were and are no claimants and that undoubtedly has pleased the bankers.... [H]ave they been insensitive and glad to profit? Of course. Why would anyone expect otherwise?[324]

Rockler's comments emphasize the problem of line drawing with respect to the activities of a commercial bank.[325] Holocaust restitutions claims had to overcome considerable formal barriers. The claims were filed over 50 years after the facts, and were often instigated by descendants of victims who had either perished during the Holocaust or passed away in the following years. They initiated proceedings outside the jurisdictions where the acts were committed, and where the corporate defendants were incorporated.[326] In the end, the validity of the claims was never fully adjudicated. The parties reached a settlement agreement in 1998, whereby the Swiss banks agreed to pay an unprecedented $1.25 billion to the Holocaust plaintiffs in exchange for a release of claims by the plaintiffs relating to the Holocaust, World War II, and targets of Nazi persecution.[327] These lawsuits attracted some criticisms. In relation to the calculation of reparations due by companies that benefited from slavery, Lord Anthony Gifford, a senior British barrister, conceded:

> Such an approach would create more problems than it solved: Enormous research

[324] WJ Rockler, 'Bankers Not Collaborators' Washington Post, 22 July 1997, A15.
[325] Ramasastry, 'Secrets and Lies?' (n 241), 393
[326] Bilsky (n 320), 349-75.
[327] *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142 (E.D.N.Y. 2000).

> would be needed to identify the companies and the families, to determine how much money was made by their ancestors, and to calculate how much should be forfeited by the present shareholders or family members. The process would inevitably be somewhat arbitrary, and potentially oppressive, and it would be rejected both by the targets themselves and their governments.[328]

Lawsuits in US courts were almost always dismissed or denied.[329] For example, plaintiffs in the lawsuit against *Ford Motor* sought disgorgement of profits accumulated over more than 50 years, alleging that the US-based *Ford* parent company profited from the rapid growth of its German subsidiary. [330] This amount was in practice almost impossible to quantify, but lawyers initially requested $37 billion. The suit against *Ford* was finally dismissed because the claims exceeded time limits imposed under German and US laws.[331] In a separate ruling on four cases involving *Degussa* and *Siemens*, two German companies, the US district judge decided that the matter was a subject of international treaties and not civil law – the question of payments to victims was left to states, not courts, to decide.[332]

But the thread of lawsuits in the United States, contributed to the pressure to negotiate reparations with the surviving labourers and their representatives.[333] Despite lawsuits being dismissed, any German company with a subsidiary in the United States was potentially liable under US law.[334] Although companies admitted no legal obligation, they started talking of their 'moral responsibility' to former labourers. *Volkswagen* set aside DM45 million for 'humanitarian projects'. *Siemens*, which had tried to document its innocence within months of the war's end, offered up to $1,250 per slave labourer – but with a written insistence that it was not under 'any legal or moral obligation' to do so. The company placed advertisements in East European newspapers to track down its former labourers, but it declined to increase its offer when additional claimants came forward, causing the actual average payment to shrink to

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[328] A Gifford, 'The Legal Basis of the Claim for Reparations', paper presented to the first Pan-African Congress on Reparations, Abuja, Nigeria, 27-29 April 1993.
[329] For the Farben settlement, see *Kelberine v. Societe Internationale*, Interhandel, 363 F.2d 989 (D.C. Cir. 1966). See also, Borkin (n 316), 205-22.
[330] *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 432-34 (D.N.J. 1999) (discussing allegations about Ford's use of slave labour and the impact of that labour on the company's profitability).
[331] Stephens (n 97), 46-51.
[332] M du Plessis, 'Reparations and International Law: How Are Reparations To Be Determined (Past Wrong or Current Effects), Against Whom, and What Form Should They Take?' (2003) 22 Windsor YB Access Just, 44.
[333] Authers (n 316), 431-32.
[334] Ibid., 431.

$825 – in total *Siemens* paid out DM20 million.[335] After the $1.25 billion settlement with the Swiss banks, other claims were made against German and Austrian firms accused of profiting from slave labour.[336] These cases were also settled and led to the establishment of a $5 billion fund to which the German government and corporations contributed in equal shares.[337]

Out-of-court Financial Settlements

Civil litigation is irremediably linked to settlement as a dispute-resolution mechanism, and settlement, by definition, undermines the attempt to determine legal and historical responsibility, as it allows the defendant to pay without the issue of liability being determined.[338] In March 2016, for example, *Anglo American* and *AngloGold Ashanti* reached an out-of-court settlement with 4,365 mine workers worth up to R464 million to be paid into an independent trust.[339] *Wiwa v. Shell*, which was initiated on the accusation that *Shell* was complicit in human rights violations in Nigeria by funding the military to suppress civilians living in *Shell*'s operational area, also reached closure through an out-of-court settlement.[340] This settlement may have implicitly acknowledged *Shell*'s role in contributing to violations, but it kept issues around the alleged violations from receiving formal legal treatment.[341] Further, in 2004, just one day before a hearing by the court of appeals in the long-running *Unocal* litigation, the parties reached an out-of-court settlement. In the settlement, the exact terms of which are confidential, *Unocal* agreed to compensate the plaintiffs and provide funds for programmes in the Myanmar's pipeline region, but denied any complicity in human rights abuses with the Myanmar military junta.[342] Although the outcome of the case could arguably be considered a success, the settlement signified no further judicial scrutiny of the circumstances of the case.

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[335] Bazyler (n 315), 31-39.
[336] According to claims filed against Ford, for example, the Ford affiliate in Germany operated with as much as half of its workforce composed of forced labourers, *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 432-33 (D.N.J. 1999). See also, Bazyler (n 314), The Economist (n 314), 75; Stephens (n 97), 46-51.
[337] Bilsky (n 319), 349-75; B Neuborne, 'Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement' (2003) 58 NewYork Univ Annual Survey American L 615; Bohoslavsky and Rulli (n 228), 834.
[338] Bilsky (n 319).
[339] Leigh Day, 'Victory at last for South African gold miners as Anglo American and AngloGold agree landmark silicosis compensation scheme' 5 March 2106 <https://www.leighday.co.uk/News/News-2016/March-2016/Victory-at-last-for-South-African-gold-miners-as-A> (accessed 10 September 2017).
[340] *Wiwa v. Shell* (n 114).
[341] Bohoslavsky and Opgenhaffen (n 80), 159.
[342] *Unocal* (n 114).

As seen above, none of the Holocaust restitution cases was ultimately resolved on the merits. To avoid reputational damage and the monetary costs of litigation, corporations preferred to settle cases outside the courts without any formal acknowledgement of legal responsibility.[343] The settlements reached between the parties avoided any clear ruling on the legal responsibility of the corporations. Some legal scholars and historians have criticized this litigation, raising doubts as to the measure of redress achieved for Holocaust victims. For example, for legal historian Michael Marrus, the litigation not only failed to contribute to historical understanding, it also distorted the historical picture of the involvement of corporations in the Holocaust.[344] He argues that the focus on monetary gains shifted attention away from the gravest crime committed during World War II to theft. '[The law] gets the history wrong', Marrus claims.[345] The legal pressure, however, did yield some historical findings. Swiss banks agreed to a comprehensive audit, and German corporations established historical committees and opened their archives to historians to investigate their involvement in the Holocaust.[346] Though the courts did not make any pronouncement of liability, they were actively involved in the negotiation process as well as in the implementation of the Swiss bank settlement, issuing numerous rulings as to the proper categorization of claims and allocation of funds.[347] In addition, by making claims of economic and property rights under the ATS, the Holocaust plaintiffs helped further an expansion of the substantive human rights recognized by international law.[348]

Settlements are a two-edged sword. By accepting a settlement victims effectively renounce a final decision on the case and the potential granting of any different form of reparation.[349] The out-of-court settlements of cases is frustrating for academics and activists because they impede the development of a much needed jurisprudence, and limit the goal of achieving corporate accountability and finding the truth about corporate involvement. But they reflect the financial

[343] MR Marrus, *Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s* (University of Wisconsis Press 2009), 32; EG Korman, 'Rewriting the Holocaust History of the Swiss Banks: A Growing Scandal' in MG Bazyler and R Alford (eds.), *Holocasut Restitution: Perspectives on the Litigation and Its Legacy* (NYU Press 2006), 115.
[344] Marrus (n 343).
[345] Ibid.
[346] E Barkan, The Guilt of Nations: Restitution and Negotiating Historical Injustices (WW Norton 2001), 88–111..
[347] Bergier Committee, Final Report of the Independent Commission of Experts, Switzerland. Second World War (2002), 276–77.
[348] KL Boyd, 'Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level' (1999) Byu L Rev 1139, 1179.
[349] Sandoval and Surfleet (n 224), 106.

realities and risks to corporations and to the claimants of not settling. Unless a company is confident of a resounding victory and reassured that no significant evidence damaging to its reputation will emerge at trial, the risk of going to trial usually makes little commercial sense. Settlements also provide the quickest way for victims to obtain compensation.[350] Litigation against corporations often takes a long time and involves high costs. Prolonged litigation often works to the disadvantage of the victims, in particular where their need for a remedy is immediate. For the South African miners, whose legal battle against *Anglo American* and *AngloGold Ashanti* began in 2004, the agreement was probably a relief. Likewise, the settlement in *Unocal* was a relief for Myanmar victims.[351]

Further, settlements may also lay the ground for the production of new historical narratives. The process of the *Unocal* litigation, for example, did shine some light on the evidence against the company. In its decision granting summary judgment, the court described the history of *Unocal*'s presence in Myanmar and its knowledge of the forced labour problem.[352] The court concluded, 'the evidence does suggest that Unocal knew that forced labour was being utilized and it…benefited from the practice'.[353] Similarly, despite failed attempts to litigate under the ATS the role of companies such as *Chiquita* and *Drummond* in the conflict in Colombia, the information retrieved in these lawsuits have shed some light on the material and economic aid companies provided to paramilitary groups.[354] In addition to serving the punitive goals of justice, another function of judicial processes against corporations after periods of mass atrocity is to help understanding the systems that worked together to make these crimes possible, serving to discourage similar behaviour in the future, and authenticating an historical record about a given regime's functioning. [355]

While the unprecedented sums paid in the *Holocaust Litigation* settlement made particularly salient the goal of reparation, the actions also brought about a certain degree of truth and reform of the corporate culture. Despite the absence of any court decision determining the degree of their liability, following the lawsuit, the defendant Swiss banks agreed to extensive

[350] Meeran (n 97), 10.
[351] S Deva, 'Human Rights Violations By Multinational Corporations and International Law: Where from Here?' (2003) 19 Connect J Intl L 1, 8.
[352] *Unocal* (n 114), 1297-98.
[353] Ramasastry, 'Corporate Complicity' (n 32), 130-39.
[354] NC Sanchez, 'Corporate Accountability, Reparations, and Distributive Justice in Post Conflict Societies' in Michalowski (n 61), 114, 127.
[355] Bohoslavsky and Opgenhaffen (n 80), 197-201.

audits, and many German companies established internal historical committees charged with examining their involvement in the Holocaust, opened their archives to historians, and publish their findings.[356] These archives were private and would not have been opened if not for the lawsuit.[357] Indeed, 'the lack of adjudication transferred the question of the defendants' responsibility from the legal to the moral level'.[358] Leora Bilsky argues that the class actions shifted attention from the individual perpetrator to the organization, and specifically to the complicity of private corporations in the plunder of victims of the Nazis, and put unprecedented pressure on the corporations to cooperate with the plaintiffs' representatives.[359] The civil action lawsuit allowed the financial story behind the Holocaust and the story of corporations' involvement and contribution to the Nazi regime to be told.[360]

The clarification of the historical narrative continued after the settlement was reached. At that point, the entitlements of individual survivors and their families had to be ascertained.[361] Thus, following the settlement, questionnaires were sent to approximately one million survivors and their families, seeking to allow potential class members to express support or opposition to the settlement, as well as to gather information to assist the court in designing a fair scheme of allocation of the settlement funds.[362] In the view of Burt Neuborne, a central reason to bring the cases was 'to speak to history – to build a historical record that could never be denied'.[363] Thus, in parallel to the opening of the defendants' archives, the lawsuit produced a large repository of oral history consisting of testimonies by survivors.[364]

Civil Litigation in other Jurisdictions

The ATS legislation is unique to the United States, but it has arguably motivated lawyers in other countries to explore the feasibility of their jurisdictions in establishing civil liability of corporations involved in human rights abuses. There are a small, but growing number of civil

[356] Bilsky (n 320), 349-75.
[357] Ibid.
[358] G Feldman, 'The Historian and Holocaust Restitution: Personal Experiences and Reflections' (2005) 23 Berkeley J Intl L 347.
[359] Bilsky (n 320), 349-75
[360] Ibid.
[361] B Neuborne, 'Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts' (2002) 80 Washington U LQ 795, 801.
[362] Ibid., 795, 801, 827, 828, 830.
[363] Ibid., 830.
[364] Bilsky (n 320).

claims being brought in different jurisdictions seeking such liability.[365] These developments are creating a network of avenues to accountability and justice that is slowly establishing opportunities for victims to obtain civil redress after times of conflict or repression.[366] For example, in 1997, five South Africans suffering from asbestos-related diseases brought a suit against *Cape* in the English High Court seeking compensation.[367] The plaintiffs, former *Cape* workers and people living in the vicinity of *Cape*'s asbestos mining and milling operations in South Africa, alleged that *Cape* exposed its workers to thirty times the British legal limit of asbestos dust. More victims joined the case, which ended in 2003 with an out of court settlement with the 7,500 claimants for £7.5 million.[368] *Cape* benefitted financially by operating in an apartheid state where health and safety of black workers was of little value and tort law was used to complement the reparations owned by the state to the victims.[369]

The apartheid legacy led also to litigation against mining companies in South Africa.[370] The South Africa's TRC had indicated that the gold mining industry had been critical in designing and benefitting from the exploitative migrant labour system.[371] In 2012, lawyers started to test the courts in South Africa for silicosis-related compensation claims for 4,365 mine workers against *Anglo American* and *AngloGold Ashanti*. The case was set for arbitration in April 2016, but a month before the mining companies announced they had reached an out-of-court settlement worth up to R464-million.[372] Also in 2012, attorneys filed a motion in South Africa court seeking class certification for 17,000 former gold miners suffering from the lung disease silicosis. The proposed class action named 30 gold mining companies as defendants.[373] The plaintiffs allege that the companies knew of the dangers posed to the miners by exposing them to silica dust, but failed to take adequate measures to protect the workers from this exposure. In May 2016, South Africa's High Court allowed the class action lawsuit.[374]

[365] Meeran (n 97).
[366] International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), vol III, 5-6.
[367] *Chandler v Cape Plc* (2012) EWCA Civ 525.
[368] Lubbe and others v Cape.
[369] Farah (n 139), 48.
[370] *Mankayi v AngloGold Ashanti*, Constitutional Court of South Africa, 3 March 2011.
[371] TRC of South Africa (n 174), Volume IV, Chapter II, 144, 151-55.
[372] Leigh Day (n 339).
[373] Including African Rainbow Minerals, AngloGold Ashanti, Gold Fields, and Harmony Gold.
[374] *Mankayi v AngloGold Ashanti* (n 370).

On 30 January 2013, a Dutch court in The Hague issued a ruling against *Royal Dutch Shell* and its subsidiary *Shell Nigeria* for pollution in Nigeria's Niger Delta.[375] It was the first time that a Dutch multinational corporation appeared in the civil court in the Netherlands to answer for violations committed overseas. Although all claims against the parent company were dismissed, its foreign subsidiary *Shell Nigeria* was held liable to pay compensation to one of the plaintiffs for environmental damages caused by oil spills.[376] In most cases human rights violations are committed by foreign subsidiary companies in countries affected by conflict or authoritarian regimes where human rights laws are poorly enforced. In this situations holding multinational companies accountable for abuses committed in the host state is often impossible for the victims.[377] Lawsuits brought in Nigeria are a case in point. Despite the number of litigations pending in front of Nigerian courts, very few cases have ever awarded compensation to the victims of corporate human rights violations. After *Kiobel*, the United States no longer provides an accessible avenue for justice for victims of violations committed overseas. Therefore questions have emerged as to whether European jurisdictions may constitute an alternative for holding multinational corporations accountable. The underlying issues are the competence of European jurisdictions to hold multinational companies accountable in Europe for violations committed abroad, and the task of establishing the law applicable to these specific cases.[378]

From a normative point of view, for a case against a multinational company over human rights abuses committed abroad to proceed, first the national court must establish its jurisdiction over the company's conduct or facts abroad and effectively exercise it. In the United States and few other common law countries courts may invoke the doctrine of *forum non conveniens* to abstain on the grounds that the jurisdiction would be more appropriately exercised by the courts of another country, such as the host state where the wrongful conduct occurred.[379] This

[375] *Oguru, Efanga, Milieudefensie v. Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd*, District Court of The Hague, case no. C/09/330891/HAZA09-0579, 2013; *Friday Alfred Akpan v. Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd*, District Court of The Hague, case no. 337050/HAZA09-1580, 2013; *Barizaa Manson TeteDooh v. Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd*, District Court of The Hague, case no. C/09/337058/HAZA09-1581, 2013. See also, D Cambou, 'The Dutch Shell Case: Foreign Direct Liability Claims as an Avenue for Holding Multinational Corporations Accountable for Human Rights Violations' in Černič and van Ho (n 163), 347-365.
[376] *Friday Alfred Akpan v. Shell* (n 375), 5.1.
[377] MAnderson, 'Transnational Corporations and Environmental Damage: Is Tort Law an Answer?' (2002) 41 Washburn L J 405; Cambou (n 375), 348.
[378] Cambou (n 375), 350.
[379] International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), vol III, 50-51. For countries in the European Union, Brussels Regulation I stipulates that a defendant shall be sued in its domicile,

doctrine presents a major hurdle to litigants in cases where the witnesses, other evidence and the subsidiary are all located in another country.[380]

Further, when a parent company is allegedly complicit in human rights abuses alongside its subsidiary, the ability to seek the liability of the parent company may be necessary in ensuring proper redress for the victims and their rights to remedy and reparation. However, establishing jurisdiction over a parent company for the conduct of its subsidiaries remains a complex issue. In legal terms, each company has a separate legal personality and is deemed to be a distinct entity from all other legal and natural persons.[381] This legal separation, or 'corporate veil', between different corporate entities affects whether or not a parent company can be held legally responsible in situations where its subsidiary has become involved in human rights abuses. Only in exceptional cases can the corporate veil be effectively 'pierced'. As a result, in most cases parent companies manage to escape liability even though they effectively control their subsidiaries. The use of subsidiaries in host countries and the limited liability enjoyed by corporate entities means that the harms caused by multinational companies often cannot be traced back to solvent parent companies located in home states.[382]

Until recently, the responsibility of multinational corporations for human rights violations was not a matter of concern in Europe. Very few tort cases had been brought in national courts in the European Union (EU), even though many national courts appeared to have jurisdictions over corporations operating abroad.[383] An explanation for this lack of action lies in the legal culture of EU states, which, in comparison to the United States, is far less favourable to this type of litigation.[384] In Europe public issues such as transnational human rights violations generally tend to be addressed on the basis on government intervention rather than litigation.[385]

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and that the domicile of a company is in the location of its corporate headquarters or its registered office. Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (*Brussels I Regulation*), Council Regulation (EC) No 44/2001 of 22 December 2000, art 2.

[380] Deva (n 351), 9.

[381] Under the principle of 'corporate entity' an incorporated company has a legal personality that is separated from its members B Petter, *Company Law* (Pearson Longman 2005), 23-25.

[382] P Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34(5) Cambridge J Economics, 915; Sandoval and Surfleet (n 224).

[383] J Wouters and C Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction' (2009) 40 George Washington Intl L Rev 939.

[384] L Enneking, *Foreign Direct Liability and Beyond* (Eleven International Publishing 2009) 194-95.

[385] Cambou (n 375), 352.

Since the 1999 *Brussels I Regulation*, civil laws jurisdictions entertain foreign direct liability.[386] Regardless of the nationality of the victim and of the place where the damage occurred, European multinational companies can be sued in the national courts of EU member states for abuses they committed overseas. In other words, courts can no longer make use of the *forum non conveniens* doctrine to refuse judicial competence, even if the competing *forum* would be in a non EU-member states. This conclusion could already be implied from the European Court of Justice (ECJ) judgment in the *Group Josi Reinsurance* case, which stated that the rules on jurisdiction that are now reflected in *Brussels I* are 'applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country'.[387] This was also the conclusion reached by some commentators.[388] The ECJ later explicitly confirmed the non-applicability of the *forum non conveniens* doctrine in the case of *Andrew Owusu v. N.B. Jackson*.[389] As a general principle, after the passing of the *Rome II* regulation, for any future foreign liability claim related to events that occurred after 11 January 2009, the applicable law is the law of the country where the damage occurs.[390] In other words, the law applied to foreign liability cases is the law of the host state. As an exception, however, it is possible to apply the law of a state that has 'manifestly closer connection' with the case.[391]

In the Dutch litigation, *Shell* did not contest the competence of the Dutch court over the parent company, but opposed the competence over its Nigerian subsidiary. In the Netherlands, the Dutch procedural civil code provides that a foreign subsidiary can be sued in front of the Dutch civil court by means of joint hearing when the court already has competence over the parent company, provided that the claims are connected to such extent to justify a joint hearing.[392] The decision of the Dutch court that a sufficient connection existed and therefore that the case could be tried in the Netherlands is a major step forward for litigation in the area

[386] Parliament Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 14 April 1999, Preamble, Recital 18, 1999 O.J. (C 104), 180. Replaced by EU Council Regulation (EC) 44/2001 on jurisdictions and the recognition and enforcement of judgments in civil and commercial matters 2001 OJ L 012/1.
[387] ECJ, Case C-412/98, *Group Josi Reinsurance Company SA v. Universal General Insurance Company (UGIC)*, 2000 E.C.R. I-5925, para. 61.
[388] de Schutter (n 192), 271-72; J Wouters and L Chanet, 'Corporate Human Rights Responsibility: A European Perspective' (2008) 6(2) Northwestern J Intl Human Rights 3, 292.
[389] ECJ, Case C-281/02, *Andrew Owusu v. N.B. Jackson*, 2005 E.C. R. OJ C 106.
[390] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (*Rome II*), Art 15.
[391] Ibid., Art 4.3
[392] Dutch Code of Civil Procedure, Art 7, sub 1.

of corporate accountability because it supports the concept that parent companies and their subsidiaries can be held accountable in the home state of the parent companies for abuses committed overseas.[393] The decision also confirms the existence of a nascent trend to adjudicate foreign direct liability in the EU. This decision, however, still remains an isolated success case and underlines the legal difficulties that plaintiffs may face in the course of future proceedings.

Claims by alleged victims of harm caused by the operations of UK-headquartered multinational corporations have enjoyed an increasing successful track record in British courts.[394] Cases against corporations have been pursued on the basis of tort or negligence – alleging harm caused by negligence arising from a breach of a duty of care, rather than, for example, torture or violation of the right to life. Since they involve claims for compensation and are invariably costly, these cases may serve to achieve critical elements of corporate accountability, namely monetary redress for victims and deterrence against future human rights violations.[395]

In Europe the development of foreign liability claims as a means to hold multinational companies liable for human rights abuses abroad is only in its infancy.[396] Victims of corporate human rights abuses overseas are likely to encounter many obstacles. Questions about the competence of the jurisdiction and the law applicable, in addition to the burden of proof and the cost of litigation, may seriously limit the ability of victims to seek redress in Europe.

Conclusion

Lawsuits against corporations at the domestic level have provided alternative justifications for enforcement under international law through domestic courts' interpretation and a clarification of multinational corporations' obligations under international law and the extraterritorial enforcement of human rights law.[397] Despite the occasional out-of-court financial settlement

[393] Cambou (n 375), 353.
[394] R Meeran, 'Access To Remedy: The UK Experience of MNC Tort Litigation for Human Rights Violations' in S Deva and D Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge University Press 2013), 378, 379.
[395] Ibid.
[396] Cambou (n 375), 364.
[397] Tamo (n 163), 464; Farah (n 139), 42-43; Kaleck and Saage-Maab (n 33), 709.

though, none has resulted in adequate remedies for victims to date. The obstacles faced by victims seeking to hold companies legally accountable in a transitional context are inevitably more complex. Some of these problems, common to all victims of corporate abuses, are accentuated in transitional justice contexts due to the prevalence of weak rule of law, dysfunctional judicial systems, corruption, and logistical difficulties. These challenges, of normative, practical and political nature, include: i) the inability or unwillingness of host states to prosecute corporations; ii) the difficulty in establishing jurisdiction in the home state; iii) practical problems related to the investigation of corporate crimes; iv) the urgent need to encourage investment; and v) procedural difficulties that result in most civil lawsuits being dismissed, or at the best ending in out-of-court financial settlements.

The positive obligation to address corporate abuse lies principally with host states, as the violations are committed on their territory. There are several advantages of conducting legal proceedings in the host state, above all, to ensure better access to evidence and witness testimonies. There are, however, normative and practical challenges for domestic authorities in host states conducting investigations against companies, especially multinational corporations. Relying on the human rights obligation of the host state presents two preliminary problems: first, whether the state has such an obligation (whether it has signed the relevant international human rights treaty); and second, whether the state has the will and capacity to sanction the corporate actor – especially in a transitional justice context where the host state's economy may be heavily dependent on either a specific corporation, or the need to reassure corporate entities in general that their activities and revenues are relatively safe. In addition, in transitional justice contexts the legal systems and means of enforcement are often deficient, and the state may lack *de facto* control over relevant areas, or may be the principal perpetrator of the violations in the first place.[398] The worst human rights violations are often committed during armed conflict where the rule of law is severely compromised, if not totally absent. Many wars are fought in countries with a weak police and judicial infrastructure where there is limited physical capacity to undertake even the most basic prosecutions. Systematic flaws in the domestic regulation and the judicial system due to the lack of institutional capacity and

[398] O Martin-Ortega 'Business and Human Rights in Conflict' (2008) Carnegie Council for Ethics in International Affairs, 280.

resources are likely to be prominent in host states in a transitional context.[399] In addition host authorities may themselves be involved in the abuses. In particular, in cases where the company is complicit in the abuses with an authoritarian or repressive government that may be the main perpetrator, victims face further difficulties in obtaining justice before that very state's judicial system. Because the avenues offered by transitional justice mechanisms to address corporate accountability in the host state are limited, victims may be forced to turn to litigation in other courts.[400]

The home state's use of extraterritorial jurisdiction over corporations incorporated in its territory is a useful tool in a transitional justice context where the host state may be unwilling or unable to prosecute. But home states remain equally reluctant to hold multinational companies accountable, a factor Ruggie blames, in part, on 'the permissible scope of national regulation with extraterritorial effect remain[ing] poorly understood'.[401] The civil remedies system across different jurisdictions remains a possible avenue of redress for victims of corporate human rights abuses seeking justice in a transitional context. The jurisprudence developed so far has addressed issues related to transitional justice - for example, which human rights violations are severe enough to justify litigation against corporations for complicity in actions taken by a foreign state, or how courts should address competing claims by a society that has specific transitional justice processes. As Ruti Teitel points out, the ATS litigation appears as part of an array of responses to prosecution in the absence of full political or legal transition.[402] But attempts to achieve legal accountability of corporations through extraterritorial jurisdiction face serious obstacles as the complicated history of the *South Africa Apartheid Litigation* and the recent narrowing of the exercise of extraterritorial jurisdiction by the *Kiobel* decision demonstrate.[403]

In more practical terms, as Alex Batesmith puts it, 'extraterritorial international investigations can be a real headache'. [404] Because the corporate actors involved in crimes are often located in multiple jurisdictions, investigations of such activities become expensive, time consuming

[399] L van den Herik and J Letnar Černič, 'Regulating Corporations under International Law. From Human Rights to International Criminal Law and Back Again' (2010) 8 J Intl Criminal Justice 725, 728-29; de Schutter (n 192), 237-40.
[400] Martin-Ortega (n 398), 282.
[401] 'Protect, Respect and Remedy framework' (n 25), para 14.
[402] R. Teitel, *Globalizing Transitional Justice* (OUP 2014), 169-75.
[403] Abrahams (n 173), 153-54.
[404] Batesmith (n 20), 293.

and therefore daunting. It is often difficult for victims in proceedings against corporations to satisfy the necessary standard of proof, because the company retains control over the requisite documents and evidence.[405] The capacity and willingness of law enforcement agencies to investigate such extraterritorial cases creates a further major obstacle.[406] In addition, state authorities, often reliant on revenues generated by corporate entities, are less likely to prioritise the investigation and prosecution of corporate crimes.[407] Even when they do, law enforcement officials often lack the expertise and resources to pursue this type of offence, and face difficulties in taking statements from witnesses and collecting other evidence from abroad. Ensuring adequate protection and support for such witnesses through such a complicated process may prove particularly troublesome, particularly where the home authorities are uncooperative. The political instability in post-conflict and transitional contexts adds to the challenge.

Further, the investment and economic activity that a corporation (especially a multinational corporation) could bring and particularly its scale, may be more appealing to a post-conflict state than the need to provide redress for individual or groups of citizens, for violations committed by the company.[408] Transitional governments thus have a vested interest in not investigating or prosecuting foreign companies for fear of jeopardising overseas investment and development.[409] Makau Mutua explains that transitional justice concepts comprise a two-step process of change.[410] The first seeks to stabilise a post-conflict society through temporary measures that signal a commitment to addressing past abuses and building the public's confidence in a process of reconstruction. In the second phase, those who have been aggrieved must find justice, but the place of the perpetrators of the abusive past in the future of the society is equally important. 'While justice needs to be done, concessions must be made by each side in order to move forward to a shared and common future', says Mutua.[411] A basic condition for the intervention of judicial processes in a transitional justice context is that the

[405] Kaleck and Saage-Maab (n 33), 715-16; International Commission of Jurists, *Corporate Complicity in International Crime* (n 2), Vol. II, 40; Farah (n 139), 48-49.
[406] W Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' (2009) (2009) 30 Michigan J Intl L 931, 961-64.
[407] E Harwell and P Le Billon, 'Natural Connections: Linking Transitional Justice and Development Trough a Focus on Natural Resources' in P de Greiff and R Duthie, *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009), 282, 290-99.
[408] van den Herik and Letnar Černič (n 399), 728-29.
[409] Batesmith (n 20), 293.
[410] M Mutua, 'What Is the Future of Transitional Justice?' (2015) 9 Intl J Transitional Justice, 1, 2.
[411] Ibid.

system or regime to which the accused belonged has changed – *viz*. that the transition has actually happened.[412] As a rule in such processes, it is the political or the military elites that change first. As a result, situations of transition after conflicts and repression have often lead to the prosecution of political elites.

By contrast, industry and business activities constitute a continuum in most societies, which may explain why there is often no drive for a determined legal remedy for these cases.[413] Economic elites are often seen as key actors in rebuilding a society as it goes through a political transition. Should corporations be brought to justice for complicity in human rights violations, or should they receive absolution to generate growth and economic activity in order to further national economic development? A state emerging from conflict or oppressive regimes is often less likely and perhaps even reluctant to pursue claims against corporations – especially foreign companies - during a time when it needs foreign direct investment, economic growth and development, and jobs.[414] Countries in transition are often in state of economic collapse and in this scenario corporations are often viewed as critical for economic progress. Countries emerging from conflict or authoritarianism face increased pressure to reduce corporate regulations in an attempt to attract investment.[415] As a result, even if economic actors have substantially contributed to the systemic injustice, they may not be held accountable, in a tacit promise to continue to contribute to the economic recovery. This tendency can be observed in the post-World War II cases, as well as later in the South African truth and reconciliation process and the initial position of the South African government towards claims of the *Apartheid Litigation*.[416]

Finally, as has been alluded to in this chapter, most human rights lawsuits against corporations are dismissed on procedural grounds in the early stages of litigation.[417] Complex jurisdictional and procedural difficulties have prevented most cases against corporations from being

[412] F Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8(3) J Intl Criminal Justice 783, 800.
[413] Ibid.
[414] de Schutter (n 399), 237-40; Carranza (n 281).
[415] T Van Ho, 'Due Diligence in Transitional Justice States: An Obligation For Greater Transparency?' in Letner Černič and van Ho (n 163), 229, 236.
[416] Kaleck and Saage-Maab (n 33), 718-19.
[417] K Gallagher, 'Civil Litigation and Transnational Business: An Alien Tort Statute Prmimer' (2010) 8 J Intl Crim Just 745, 751; S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart 2004).

considered on the merits.[418] Binding legal precedents in this area are generally limited to procedural issues that, albeit of tangential relevance to the substance of a case, are frequently decisive.[419] If cases survive inevitable legal procedural challenges and are not dismissed, corporate cases to date have been settled before trial as has been demonstrated in key cases in this chapter. For example, the majority of cases against corporations under the ATS ended in dismissal, while a significant minority resulted in out-of-court financial settlements, before the dispute was determined in a final judgment. No case against a corporation for human rights violations has yet been determined on the merits. But judicial processes are not the only type of remedy available for victims of corporate abuses: in transitional justice contexts, truth-seeking mechanisms can also recommend measures related to the responsibilities of companies and reparations for victims. The next chapter analyses this aspect.

[418] eg *Rio Tinto* (n 146), *In re Union Carbide Corp Gas Plant Disaster at Bhopal*, 634 F. Supp 842, 850-51 (S.D.N.Y. 1986), *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 526 (S.D.N.Y. 2002).
[419] Meeran (n 97).

IV. TRUTH SEEKING PROCESSES

Introduction

After the assessment of the limitations, and potentials, of international, regional and national courts to establish corporate accountability and provide reparations for victims, the analysis turns to the work of truth-seeking processes, in particular truth commissions. Truth commissions are a typical transitional justice mechanism, with widespread use across the world, seeking to enable societies come to terms with the human rights violations perpetrated during the period of strife from which they are emerging. The UN Secretary General describes truth commissions 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'. [1] State practice of truth commissions vary: in some cases truth commissions are considered complementary to criminal trials, in others they may even form an alternative to criminal justice, where trials are unlikely because of an overwhelming number of perpetrators, a destroyed justice system, or political deals involving amnesties. [2] Although described as 'non-judicial' bodies, truth commissions are, in effect, official bodies, usually established by legislation and often conferred with a wide range of legal powers, including compelling powers such the ability to subpoena, search and seize. [3] Each truth commission is a unique institution, but their core activities usually include collecting statements from victims and witnesses, conducting thematic research, organizing public hearings, and publishing a report outlining findings and recommendations. [4] Some commentators believe that a state's duty to investigate and provide effective remedies, especially in the absence of a functioning judiciary system, mandates the creation of a truth commission to examine a repressive past. [5]

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[1] Report of the UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies', UN Doc. S/2004/616, 3 August 2004, 17.
[2] W Schabas and S Darcy (eds.), *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (Kluwer 2005).
[3] M Freeman, *Truth Commissions and Procedural Fairness* (CUP 2007), 188.
[4] Ibid.; PB. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* 89 (Routledge 2001), 251; S Darcy 'Truth Commissions, the European Union and Reparations from Business' in F Medjouba (ed.), *Building Peace in Post-conflict Situations, British Institute of International and Comparative Law* (BIICL 2011) 43, 43; E Wiebelhaus-Brahm, 'Truth Commissions and Other Investigative Bodies' in CM Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Intersentia 2010), Vol I, 477.
[5] J Pasqualucci, 'The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System', (1994) 12 BU Intl LJ 333; P Clark, 'Establishing a Conceptual Framework:

Priscilla Hayner, a scholar who undertook comprehensive research on the work on truth commissions, specifies that truth commissions are usually focused on the past, rather than on on-going events, and will often investigate a pattern of events that took place over a period of time. [6] Because truth commissions generally seek to address systemic patterns of human rights violations, rather than those that may occur solely against specific individuals, they usually have the mandate to examine the underlying causes, consequences, and nature of gross human rights violations that other processes are often restricted from engaging with, not least due to statutory time limitations. [7] As part of their varied mandates, TRCs have started to pay more attention to the range of different actors involved in perpetrating violations or part of the state infrastructure that tolerated violations, including corporations. [8] While the majority of truth commissions have focused on the state's responsibility for human rights violations, an emerging number of commissions have recognised business responsibility too in their final reports. [9] In this sense, they play the unique role of establishing an official record of corporations' involvement in past abuses. [10]

In addition to truth commissions, UN-mandated commissions of inquiry, fact-finding missions and other investigative bodies are increasingly being used to respond to situations of serious violations of international humanitarian law and international human rights law, often in times

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Six Key Transitional Justice Themes' in P Clark and Z Kaufman (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst 2009), 203. Hayner (n 4), 25, 26 W Lambourne, 'Transformative Justice, Reconciliation and Peacebuidling' in S Buckley-Zistel and others (eds.), *Transitional Justice Theories* (Routledge 2013), 25, 26-28; Freeman (n 3), 34); Darcy (n 4), 43-46.

[6] Hayner (n 4), 11-12.

[7] For example, the Liberia TRC was mandated to establish 'the antecedents, circumstances, factors and context of violations and abuses', *An Act to Establish the Truth and Reconciliation Commission of Liberia* (2005) art IV, Section 4(a). See also, Hayner (n 4), 77; R Carranza 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 Intl J Trans Just 310, 319-21.

[8] See for example, Commission for Reception, Truth and Reconciliation in East Timor (CAVR), *Chega!* (2006) [CAVR East Timor, *Chega!*], Part 3, 6-13; Truth and Reconciliation Commission of South Africa, *Final Report* (1998), Vol II, Ch 7, 694; Volume V, Ch 6, 228, 278, 445 [TRC South Africa report]; Truth and Reconciliation Commission of Liberia, *Consolidated Final* Report, 30 June 2009 [TRC Liberia report], Vol III, title III. See also, BS Lyons, 'Getting to Accountability: Business, Apartheid and Human Rights' (1999) 17 Netherlands Quarterly Human Rights 135; N Nattrass, 'The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation' (1999) 98 African Affairs 373.

[9] eg, TRC East Timor report (n 8); TRC South African report (n 8); TRC Liberia report (n 8). See also, G Koska, Corporate Accountability in Times of Transition: The Role of Restorative Justice in the South African Truth and Reconciliation Commission' (2016) 4(1) Restorative Justice 41-67.

[10] Darcy (n 4); MP Scharf, 'The Case for a Permanent International Truth Commission' (1997) 7(2) Duke J Comp Intl Law 375; Carranza (n 7), 319-21.

of conflict and transition.[11] Normally, these are mandated to determine the facts surrounding the human rights violations, to make recommendations, and, in the case of commissions of inquiry – the highest level of investigation –, also to identify alleged perpetrators. While doing so, at times, they have also reported on the involvement of companies and businesspeople, and have framed recommendations to address their responsibilities.[12] This chapter addresses this aspect as part of the attempt to identify a remedy-oriented architecture that can effectively address corporate human rights violations occurred in transitional justice contexts.

This chapter first describes the investigations and finding of the TRCs and other bodies and then assesses their limitations in relation to corporate accountability. It looks in particular at the work of TRCs, starting with the South Africa's TRC, whose findings represent the first and one of the most important contributions in the area of corporate accountability (Section IV.1). This section is followed by an exploration of the work of truth commissions established in Liberia, East Timor, Sierra Leone, Argentina, and Brazil, alongside the contributions made by other investigative bodies (Section IV.2). The objective of this section is to describe emerging state practice in a variety of different settings. This chapter seeks to show that as a complement or alternative to judicial processes truth-seeking initiatives can recommend important measures for the accountability of companies involved in abuses during times of conflict or repression and for the reparations of victims. Often, however, mainly for economic and political reasons, governments have failed to implement such recommendations.

IV.1 South Africa's Truth and Reconciliation Commission

When Nelson Mandela became the first black president of South Africa in 1994, the government established a TRC to investigate and document human rights violations

[11] The UN has established 63 International Commission of Inquiry and other fact-finding missions – the first has been the 1963 UN fact-finding mission to Vietnam and the last the fact-finding mission to Myanmar established in March 2017. UN, Research Guide <http://libraryresources.unog.ch/factfinding> (accessed 24 September 2017).
[12] An example is the fact-finding mission established by the Human Rights Council in 2012 (resolution 19/17) to investigate the implications of the Israeli settlements on the human rights of the Palestinian people throughout the Occupied Palestinian Territory. The mission found that business enterprises, directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements. Report of the Independent International Fact-finding Mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, 7 Feb 2013, A/HRC/22/63, paras 96, 97, 117.

committed during the apartheid regime between 1960 and 1994.[13] The South African TRC was the first such commission to examine the role of different sectors of society during the previous authoritarian regime, and also the first to investigate business involvement in human rights abuses.[14] The TRC Act recognised the systemic nature of the gross violations of human rights, and that both individuals and collective entities were involved in those violations.[15] Under its comprehensive mandate, the TRC investigated systemic patterns of human rights violations through public hearings on legislated apartheid, and the roles of different sectors of the society – the health, media, legal, and business sectors.[16] The sectoral hearings at the South Africa's TRC aimed to address the issue of apartheid as part of a systemic phenomenon.

The Business Hearing

In November 1997 in Johannesburg, the South Africa TRC held a three-day institutional hearing to focus on the role of business during the apartheid era, with written and oral submissions by business organizations, companies, academics, civil society and political parties. The business hearing examined the relationship between apartheid and the economy and the role of business, government and trade unions.[17] Few corporations, however, decided to come forward and take part in the process. Most businesses were deliberately uncooperative during the hearing.[18] Archbishop Desmond Tutu, Chairperson of the TRC, concluded that there were 'glaring absences' in the business submissions that the TRC received. 'No one today admits to supporting apartheid', Tutu lamented in his opening remarks to the hearings.[19] He continued that it would be 'wonderful to have someone here saying "we did this and we did that"…and we want to rub some oil on the wounds'.[20]

The Commission conceded that business largely refused to participate in the hearings.[21] The

[13] M Parlevliet, 'Considering Truth. Dealing with a Legacy of Gross Human Rights Violations' (1998) 16(2) Netherlands Quarterly Human Rights, 172-174.
[14] J Barnard-Naudé, 'For Justice and Reconciliation to Come: The TRC Archive, Big Business, and the Demand for Material Reparations' in F du Bois and A du Bois-Pedain (eds.), *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge Studies in Law and Society 2008), 172; Nattrass (n 8), 374-75; Darcy (n 4), 53, 54.
[15] South Africa Government, Promotion of National Unity and Reconciliation Act, No. 34 of 1995, Chapter 1, section l(ix) [South Africa TRC Act].
[16] Ibid., Chapter 2, section 4(a)(i) section 4(a)(iv)). See also South Africa TRC report (n 8), Vol 4.
[17] South African TRC, Press Release, Statement on Business Role Submissions, 4 September 1997.
[18] J Simcock, 'Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission' (2011) 47 Stan J Intl L 239, 242, 249-53.
[19] South Africa Press Association, 'Some Glaring Absences in Business Submissions to TRC: Tutu' 11 November 1997.
[20] Ibid.
[21] South Africa TRC report (n 8), Vol 4, Ch 2, 18-19.

TRC broad assessment was that, 'businesses were reluctant to speak about their involvement in the former homelands'. [22] The report reserved special mention for the agriculture and mining industries, highlighting that '[I]t was particularly regrettable that representatives of commercial agriculture did not participate in the hearing, despite an invitation to do so'. [23] It was also 'regrettable that the Chamber of Mines made no mention in its submission of the active role they played in constructing and managing the migrant labour system'.[24] Arguably, given the uncertain legal consequences that the TRC posed, some corporations simply opted out of the proceedings, preferring the risk of being stigmatized for their absence, to the risk of a concrete and public assessment of their direct or indirect culpability in maintaining, supporting or collaborating with the apartheid regime. Most notable amongst the absentees, the TRC reported, were the multinational oil corporations, such as *Shell* and *BP*, the largest foreign investors in South Africa during apartheid, which did not even respond to the invitation to take part. [25] As such, the conspicuous absence of testimony and submissions from multinational corporations doing business with the apartheid regime was a major omission from the hearings overall. [26] Although their activities were chronicled in the testimony and submission from the Anti-Apartheid Movement (AAM) Archives Committee, which focused on the role of the multinationals during the period 1960-1994, this absence permitted critical actors to be free from any scrutiny for their roles in the apartheid and related rights violations.

With few exceptions, businesses denied any active involvement with the apartheid government.[27] They rejected any notion of culpability and resisted any attempts to link their business activities with human rights violations. This also applied to the media sector where the Afrikaans press declined to participate in the media hearing. *Nasionale Pers*, the largest Afrikaans newspaper publishing company, claimed that its affiliated papers did not commit any human rights abuse and therefore had nothing relevant to contribute to the TRC process.[28] A few representatives of the *South Africa Broadcasting Corporation* (SABC) were prepared to admit that the SABC served as the propaganda arm of the government and thus contributed to

[22] Ibid., Vol 4 'Final Recommendation on Business Hearings', 36.
[23] Ibid., 28.
[24] Ibid.
[25] Ibid., 18.
[26] Lyons (n 8), 153-54.
[27] South Africa TRC report (n 8), Vol. 4, 58.
[28] Ibid.

abuses of human rights.[29] But justifications and excuses abounded: the government was hostile, the general climate was dangerous and the SABC sought to portrait itself as valiantly seeking to do what it could in such an environment.[30] The English language press took a similar position: in its submission *Times Media* denied that their newspaper had not done enough to oppose apartheid.[31]

Some of the business submissions accepted that apartheid benefited certain business interests such as Afrikaner capital,[32] but all rejected the idea that apartheid was good for business. The role of businesses in supporting the government during apartheid seemed to be a case of 'selective creeping amnesia' among white businesses.[33] As Beth Lyons points out, what was most significant in white businesses' testimony and submissions were the topics they *did not* address.[34] One of the omissions was any reference to businesses' role in the military-industrial complex.[35] As a representative of Barlow Rand, an electronic equipment manufacturer who supplied the military-industrial complex for 27 years put it, '[T]here was no direct violation of human rights that could be attributed to business'.[36] *Armaments Corporation of South Africa* (Armscor), a state-owned armaments company that supplied weapons to the military, concluded that '…despite the covert and clandestine methods used by this organisation in the past, we have been unable to unearth what appears to be transgressions [of human rights]'.[37] One of the very few business inputs that reflected critically on business support for the ideology of apartheid, was the submission from the *Afrikaner Handelsinstituut* (AHI), the main organization of Afrikaner business:

> Without in any way detracting from the AHI's willingness to accept responsibility…it must be noted that support for separate development was part and parcel of the

[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Anglo American, for example, complained that hostility from the National Party at times affected its ability to do business and South African Breweries (SAB) complained of a similar bias which forced them out of the retail liquor, wines and spirits industries. South Africa TRC report (n 8), Anglo American, Submission, 13; SAB, Submission, 15.
[33] Lyons (n 8), 144.
[34] Ibid., (137-41).
[35] South Africa TRC report (n 8), 126: 'hundreds and probably thousands of South African private sector companies made the decision to collaborate actively with the government's war machine. This was no reluctant decision imposed on them by coercive apartheid legislation. Many businesses, including subsidiaries of leading corporations, became willing collaborators in the creation of this war machine'.
[36] AM Rosholt, Business Hearings, 11 November 1997.
[37] South Africa TRC report (n 8), Armscor, Submission.

> majority of the white community's thinking at the time…the notion that the separate development of South African population groups was seen as the best guarantee for overall justice and peace in the country. The AHI was part of that collective thinking. [38]

Some business submissions included apologies for not having done more. *Anglo-American*, for example, apologized for not having provided more married accommodation for black workers. [39] This was regarded as one of the 'missed opportunities' and the corporation acknowledged 'with regret that we did not sufficiently progress these and many other opportunities to oppose apartheid and hasten its demise'. [40] Other than this omission *Anglo-American*'s submissions lacked any acknowledgment of its responsibility for human rights abuses perpetrated in its mines. To fill in the missing pieces, one has to turn to submissions made by trade unions that document the mining disasters, the role of the mine security during strikes, and the use of convict labour in furthering business interests and generating output, revenues and profit. [41]

Financial institutions were among the few private entities admitting that the economic sector was tied to apartheid. The submission from the *Council of South African Banks* acknowledged that apartheid was a political, social and economic system, which depended for its efficacy on all those three 'pillars', and that senior bank officials lent 'credibility' to apartheid governmental structures. [42] The submission highlighted:

> The banks were knowingly or unknowingly involved in the provision of banking services and the lending of money to the apartheid government and its agencies…Banks cannot exist otherwise than within the systems and structures of the country in which they operate. [43]

With respect to its role in human rights violations, the *Development Bank of Southern Africa* admitted that it was 'an integral part of the system and part and parcel of the apartheid gross

[38] Ibid., AHI, Submission, 4.
[39] Ibid., Anglo-American, Submission, 4.
[40] Ibid., 12.
[41] South Africa TRC report (n 8), Vol 4, 58, COSATU, Submission, 9, para 21. See also, D Innes, 'Anglo-American and the Rise of Modern South Africa' (1984) Monthly Review Press.
[42] South Africa TRC report (n 8), The Banking Industry, Submission, 6, sect 5.3.4, 6.1.
[43] Ibid., 2, sect 2.3.

violation of human rights'.[44] In its submission, the *Land and Agricultural Bank of South Africa* acknowledged participation in policies that often, as acts of omission, supported rural and agricultural apartheid.[45] One of South Africa's former prime ministers, referring to the support financial corporations provided to the government at that time said that 'each bank loan, each new investment [was] another brick in the wall of our continued existence'.[46]

The submissions from white businesses were contested by testimony from businesses and organisations in the black, Indian and Muslim communities, and the labour and antiapartheid movement. Submissions critical of business argued that apartheid was a system of exploitation that benefited capital. As the African National Congress (ANC) put it:

> Apartheid was associated with a highly unequal distribution of income, wealth and opportunity that largely corresponded to the racial structure of society…Historically privileged business as a whole must, therefore, accept a degree of co-responsibility for its role in sustaining the apartheid system of discrimination and oppression over many years.[47]

While most critical submissions recognized that apartheid affected different categories of business differently, they pointed to the association between apartheid policies, racial injustice and South Africa's racially based income distribution, and concluded that business was morally implicated in apartheid.[48] As the AAM Archives Committee concluded, 'the speed with which the apartheid edifice then crumbled [after the withdrawal of international business]...is the final proof, if any were needed, of the way in which international business sustained apartheid'.[49]

One of strongest statements came from Sampie Terreblanche, an Afrikaner academic and critic of the apartheid government. In his keynote speech at the TRC business hearings, he argued:

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[44] Ibid., DBSA Submission, 13.
[45] South Africa TRC, Business Hearings, 11-13 November 1997, Days 1-3.
[46] Quoted in JP Bohoslavsky and V Opgenhaffen, 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship' (2010) 23 Harvard Human Rights J 157, 159.
[47] South Africa TRC report (n 8), ANC, Submission, 1-2.
[48] See, ibid., vol. 4, 30-2 (on Afrikaner business); 33-36 (on the mining industry); 36-37 (on the armaments industry); 46-51 (on the role of business in the 1980s). See also, Nattrass (n 8), 378.
[49] South Africa TRC report (n 8), Anti-Apartheid Movement, Submission, 19.

> The true importance of the symbiotic relationship between the white controlled state and racial capitalism was that the state was, over a period of more than 60 years, always prepared to promulgate legislation to keep black labour costs low and to suppress all kinds of black labour unrest with undue ferocity…Without a clear understanding of the systemic nature of the exploitation that has taken place, it would also not be possible for the beneficiaries (i.e. mainly whites) to make the necessary confession, to show the necessary repentance, to experience the necessary conversion and to be prepared to make the needed sacrifices. [50]

The TRC relied on exposing the truth as a basis for accountability for crimes committed during the apartheid era. [51] For perpetrators, 'bringing the darker side of the past to the fore' was described as a chance to acknowledge their responsibility as well as fulfilling the demand for accountability.[52] The business hearing was intended as a site for contestation, and the opportunity to deliver truth and accountability for alleged corporate crimes committed during apartheid. In fact, the hearing can be seen to have provided corporations 'with a subject position from which to speak and from which to represent its version of, and its position in, the past'.[53]

The experience of the business hearings illustrates Leigh Payne's warning that truth commissions can be used as instruments to control collective memory.[54] The business hearings reflected the disparate versions of the past.[55] The TRC report summarized these claims collectively: 'the other position, argued mainly by business, claims that apartheid raised the costs of doing business, eroded South Africa's skill base and undermined long-term productivity and growth. In this view, the impact of apartheid was to harm the economy'.[56]

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[50] Ibid., S Terreblanche, Testimony, 3-4, 26.
[51] J Brankovic, *Responsabilidad y Reconciliación Nacional nn Sudáfrica* (Ediciones InfoJus 2013), 2(4), 55-86.
[52] South Africa TRC report (n 8).
[53] B Harris, The Archive, Public History and the Essential Truth: The TRC Reading the Past' in C Hamilton (ed.), *Refiguring the Archive* (Kluwer 2002), 161, 164.
[54] Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Duke University Press 2008), 36-39.
[55] Lyons (n 8), 141-49.
[56] South Africa TRC report (n 8), Vol 4, 19.

Most of the white businesses tried to refute the structural contention that they were tied to the apartheid government and that they acted in complicity with, and profited from apartheid. They contended instead that businesses existed in a 'political vacuum'.[57] Some companies used the TRC as a forum from which they could launch complaints, claiming that they too were victims of apartheid. With no punitive incentive, Audrey Chapman argues, 'white business tended to use the business and labour sector hearings more as public relation opportunity than as an exercise in truth telling and acknowledgment'.[58]

The TRC did not assess whether the claims of businesses were, at least partially or for some business, true, or whether the apartheid system could have in some way affected some types of business or not; instead it adopted a generalised approach. The TRC did recognise that '[C]learly not all businesses can be tarred with the same brush', but by condemning ordinary business activities (the 'third-order involvement detailed in the next section) it suggested that 'all who prospered under apartheid have something to answer for, in that they took advantage of a situation which depressed the earnings of black South Africans, whilst boosting their own'.[59] It stated that:

> The current distribution of wealth (which is substantially concentrated in white hands) is a product of business activity that took place under an apartheid system that favoured whites. This acts as a counterbalance to statements by business that apartheid harmed them, a reminder that white business accumulated (sometimes vast amounts of) wealth in spite of this alleged harm.[60]

The TRC's Findings on Business

The TRC's final report found that the business sector had been 'central to the economy that had maintained the South African state during the apartheid years'.[61] The Commission found that some sectors of business were more involved with the apartheid regime than others, but that most businesses were culpable by virtue of having benefited from operating in a racially

[57] Lyons (n 8), 137; K Asmal, R Suresh Roberts (eds.), *Reconciliation, Through Truth, A Reckoning of Apartheid's Criminal Governance (*David Philip Publishers 1996), 153-57.
[58] A. Chapman, 'Truth Recovery Trough the TRC Institutional Hearings Process' in A Chapman and H van der Werwe (eds.), *Truth and Reconciliation in South Africa; Did the TRC Deliver?* (University of Pennsylvania Press 2008), 169, 179.
[59] South Africa TRC report (n 8), Vol. 4 Ch 2, para 32
[60] Ibid., para 33.
[61] Ibid., Vol 6, Sect 2, Ch 5, 'Reparations and the Business Sector', 58, 140; Vol 4, Ch. 2, 58, 161.

structured environment. The TRC concluded:

> The degree to which business maintained the status quo varied from direct involvement in shaping government policies or engaging in activities directly associated with repressive functions to simply benefiting from operating in a racially structured society in which wages were low and workers were denied basic democratic rights.[62]

The TRC thus shifted from a focus on individual perpetrators, to a systematic analysis that equated profitable activity with prospering under apartheid, and drew a link between benefiting from the apartheid's system of racial privileges and having a moral culpability for it.[63] The Commission found:

> Certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies. Other businesses benefitted from co-operating with the security structures of the former State. Most businesses benefitted from operating in a racially structured context.[64]

Recognising that businesses were not a single homogenous category, the TRC's final report identified three orders of involvement in the apartheid system.[65] The businesses that were directly involved 'with the state in the formulation of oppressive policies or practices' were considered to be those of the first order.[66] The commission concluded that business involved in this way 'must be held responsible for the suffering that resulted'.[67] The TRC focused on the mining industry, which worked with the government to shape discriminatory policies, such as the migrant labour system, to its own advantage.[68] Companies that knew 'that their products or services would be used for morally unacceptable purposes' fell within those deemed to be of the second order of involvement in the apartheid system.[69] This included the armaments

[62] Ibid., Vol 6, Sect 2, 140.
[63] Nattrass (n 8), 378.
[64] South Africa TRC report (n 8), Vol 4, Ch 2 'Institutional Hearings: Business and Labour', 58, paras 161-67, Vol 5, Ch 6 'Findings and Conclusions', para. 161.
[65] Ibid., Vol 4, Ch 2, paras 23-36
[66] Ibid., 24, para 23.
[67] Ibid.
[68] Ibid., 33, para 63. The TRC goes on to chastise the mining industry for not mentioning their role in the migrant labour system, or their active suppression of black unions and their dismal health and safety record, ibid., 33-34, paras 161-67; Vol 5, Ch 6, paras. 163-67.
[69] Ibid., Vol 4, 25, para 26, 28.

industry's provision of equipment used to abuse human rights, and more indirect assistance, such as banks' provision of covert credit cards for repressive security operations. For example, the TRC concluded, '[t]he banks played an instrumental role in prolonging apartheid from the time of the debt crisis in 1985 onwards'.[70]

Finally, the Commission identified a 'third order involvement': ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of apartheid.[71] Some of the business submissions grappled with the issue of third-order involvement by asking whether, by merely doing business under apartheid, they were supporting the system.[72] The *Textile Federation*, for example, pointed that its only link with the state was the service of clothing contracts.[73] Third order involvement is the most problematic of the three orders because it proceeds beyond the bounds of intent and implies guilt by association. The Commission even asked, in some instances, 'whether business had done enough to end [apartheid]'.[74] Nicoli Nattrass argues, 'the only way in which any business could have avoided condemnation by the TRC was to have disinvested entirely from the South African economy'.[75]

The business hearings enabled the TRC to make an historical record of businesses' complex role within apartheid. As Lyons put it: 'The efforts of white businesses to expunge their crimes from history and, in that process, revise that history, had simply failed'.[76] The findings of the TRC report on business discredited the position that white businesses did not benefit from apartheid legislation, and instead specifically affirmed the collusion and complicity of business with apartheid. Although the majority of South Africans knew this, as they had experienced it every day, the hearings helped to fill in the mechanisms crucial to the functioning of the apartheid state.[77] The South Africa TRC, which did not have any judicial power, condemned business from a moral point of view for crimes of commission and

[70] Ibid., Vol 6, Sect 2, 146.
[71] Ibid., Vol 4, Ch 2, para 32.
[72] Ibid., para 34
[73] Ibid.
[74] Nattrass (n 8), 374.
[75] Ibid.
[76] Lyons (n 8), 159-60.
[77] Ibid.

omission.[78] In the course of the South African transition from apartheid the question of corporate accountability was approached from both moral and legal angles, allowing, as Nadia Bernaz argues, for a better and perhaps more balanced understanding of the truth.[79]

The TRC's Recommendations on Reparations

The transitional justice process in South Africa, through the work of the TRC, is a good example of an attempt to link corporations and reparations, despite the associated political cost of doing so.[80] The issue of reparations were a central feature of the TRC's claim to delivering justice.[81] One of the crucial tasks entrusted to the TRC was that of 'restoring the human and civil dignity of…victims…by recommending reparations measures'.[82] The TRC Act provided that reparations were to include 'any form of compensation, ex gratia payment, restitution, rehabilitation and recognition'.[83] The proposals formulated by the TRC distinguished four categories of reparations: community rehabilitation programmes; symbolic reparations measures (issuing of death certificates, exhumations reburials, and other ceremonies); administrative, legal and other institutional reforms; and individual reparations in the form of financial grants.[84] The TRC adopted a constrained 'closed list' approach when it established the requirements for reparation eligibility, limited this to victims of 'killing, abduction, torture or severe ill-treatment'.[85] Approximately 17,000 of the approximately 33 million black South Africans who suffered from the injustices of apartheid were qualified for reparations.[86] One of the Commissioners explained in this way such dilemma:

> The Act's definition of a victim immediately excluded millions of South Africans who, while they may not have suffered a gross violation of human rights in terms of the Act, nevertheless suffered the daily violation of living under apartheid. Our first painful

[78] South Africa TRC report (n 8). See also, E Doxtrader and others, *Truth And Reconciliation In South Africa: The Fundamental Documents* (Institute for Justice and Reconciliation 2007), 427.
[79] N Bernaz, 'Can the ICC Combat the Illegal Exploitation of Resources and "Lan Grabbing"?', 17 August 2017 <http://rightsasusual.com/2013/10/should-multinational-corporations-be-held-liable-for-having-done-business-with-the-apartheid-regime/> (accessed 13 September 2017).
[80] C Sandoval and G Surfleet, 'Corporations and Redress in Transitional Justice Processes', in S Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013), 93, 102.
[81] South Africa TRC report (n 8), Vol 1, 126.
[82] South Africa TRC Act (n 15), Sect. 3(1)(c).
[83] Ibid., Sect. 1.
[84] F du Bois, 'Reparations and the Forms of Justice' in du Bois and du Bois-Pedain (n 13), 121-22; D Ntsebeza, 'The Legacy of the Truth and Reconciliation Commission' in C Villa-Vicencio and E Doxtader (eds.), *The Provocations of Amnesty: Memory, Justice and Impunity* (AfricaWorld Press 2003).
[85] South Africa TRC Act (n 15), Sect. 1(1)(xix)(a), 1(1)(ix). See also, Simcock (n 18), 257.
[86] South Africa TRC report (n 8), Vol 5, at 175-76.

step was thus to limit reparation recipients to those who had been found to have suffered a gross violation of human rights, as defined in the Act.[87]

Eventually, the government provided only monetary compensation (no other forms of reparations) to the 17,000 victims with a one-off payment of R30,000 (about $4,000) each, totalling about $70 million, which fell short of the $360 million the TRC had requested.[88] Corporations did not provide any reparations, and victims of corporate abuses, such as for example labour violations, were, as a consequence, not provided reparations. At the start of the business hearing, the TRC emphasised that acknowledgement and forgiveness was only part of the reconciliation process, and that this had to be followed by reparations, including from businesses. Desmond Tutu invited corporations to make donations to the President's Fund intended for the public reparations scheme designed by the TRC to rehabilitate people affected by apartheid.[89] In its final report, the Commission stated that 'business benefitted substantially during the apartheid era…and has, at the very least, a moral obligation to assist...through active reparative measures'.[90] To give effect to this, the TRC suggested to the South African government several ways for extracting reparations payments from companies. These included: a wealth tax; a one-off levy on corporate and private income; a 1% 'donation' of the market capitalization by companies listed on the Johannesburg's stock exchange; and retrospective surcharges on corporate profit.[91] Yet nothing came out of these proposals.

Limitations of the TRC in relation to Corporate Accountability and Reparations

There is some consensus among scholars that the South African TRC did not do all it could to obtain effective reparations for victims and properly investigate corporate human rights abuses.[92] The TRC can be seen as an embodiment of South Africa's restorative justice

[87] Cited in W Orr, 'Reparation Delayed in Healing Retarded' in C Villa-Vicencio and W Verwoerd, *Looking Back, Reaching Forward: Reflections on the Truth And Reconciliation Commission of South Africa* (University of Cape Town Press 2000), 243. See also M Mamdani, 'The Truth According to the Truth and Reconciliation Commission,' in I Amadiume and A An-Naim (eds.), *The Politics of Memory: Truth, Healing and Social Justice* (Zed Books 2000).

[88] Orr (n 82), 241; Simcock (n 17), 246-48, 250-54; F du Toit, 'Victims Challenge Business' in C Villa-Vicencio and F du Toit (eds.), *Truth and Reconciliation in South Africa: 10 Years on* (Stanford 2007), 179; M Seekoe, 'Reparations' in Villa-Vicencio and du Toit, ibid., 36-45; New York Times, 'South Africa to Pay $3,900 to Each Family of Apartheid Victims' 16 April 2003.

[89] Business Sector Hearings (n 45), Day 1, 11 November 1997.

[90] South Africa TRC report (n 8), Vol 5, 318-19; Vol 6, 155. See also Doxtrader (n 78), 427.

[91] Ibid., Vol 5, Ch 8, 318-20; Vol 6, Sect. 2, Ch. 5, 143, 155. See also, CJ Colvin, 'Overview of the Reparations Program in South Africa' in P de Greiff, *The Handbook of Reparations* (OUP 2006), 176.

[92] Koska (n 9), 42; C Abrahams, 'Lessons from the South African Experience' in Michalowski (n 80); Barnard-Naudé (n 14); Lyons (n 8).

approach to transition, a path that was also chosen carefully to avoid the punitive 'victors' justice' approach to corporate and other crimes.[93] Recalling the principles developed by Declan Roche, a restorative justice process must be guided by the need to repair and heal a relationship, and is based on the participation of offenders and their reintegration back into society.[94] In certain respects the business hearing can be seen as employing restorative justice principles described by Roche: 'personalism', reparation, reintegration, and participation.[95] First, the hearing was based on personalism and focused on the experience of the workers as well as labour law violations. Second, it was clearly presented as an opportunity to remedy harm, in that the TRC directly invited businesses to seek to 'repair the wrong that accrues from whatever was done for which the person is contrite'.[96] Third, as with the entire transitional justice process in South Africa, the focus of the hearing was on the reintegration of offenders.[97] Finally, corporate involvement in human rights abuses was discussed in an open forum that included affected parties.

In key aspects, however, the process did not fulfil the essential conditions that a model of restorative justice demands.[98] Koska argues that the structure and organisation of the TRC was such that equal participation was never guaranteed due to the lack of the threat of prosecution.[99] After companies failed to respond to the invitation for submission to the business hearing, the Commission acknowledged that the non-appearance of these corporations obstructed its investigation.[100] It declined, however, to use its subpoena powers to compel businesses to appear and testify, and instead simply confirmed that those companies would not be called to attend the business hearing.[101] The Commission struggled to elicit truth, compensation or redress for the crimes alleged to have been committed by corporations, notably in the mining sector. Reparations are a critical aspect of any restorative justice process and were a central feature of the TRCs claim to deliver justice.[102] But the Commission failed to secure reparations for victims of corporate abuses.

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[93] PM Maduna, 'Declaration by Justice Minister Pennell Maduna on Apartheid Litigation in the United States', 11 July 2003 [Maduna declaration], 3.2.1.
[94] D Roche, *Accountability in Restorative Justice* (OUP 2004), 26-31.
[95] Ibid.; Koska (n 9), 50.
[96] Business Sector Hearings (n 45).
[97] Maduna declaration (n 93), 8.1
[98] Koska (n 9), 52.
[99] Ibid.
[100] Business Sector Hearings (n 45), Day 1.
[101] Ibid. See also, Chapman (n 58), 182.
[102] South Africa TRC report (n 8), Vol 1, 126.

The TRC lacked the power to order the payment of reparations; it was only empowered to make recommendations and remained reliant on the government to implement them subsequently.[103] Although the government accepted many of the TRC recommendations it hesitated at imposing compulsory reparation payments, and condemned proposals for a wealth tax, believing these to be disincentives to remain invested in the South African economy.[104] Jaco Barnard-Naudé argues that 'the transitional compromise forged by the constitutional court according to which amnesty would be give on condition that comprehensive reparations would follow was disowned'.[105] He points out that the TRC 'failed to compel the legislature to enact a law that…would have provided some relief for the suffering that occurred in the economic sphere'.[106] No subject better encapsulates the economic and political dilemmas of transitional justice than the myriads of issues related to reparation.[107] At the time that the TRC issued its final report in 2003, a post-Mandela presidency was already underway. The new administration was focused on reducing the country's high unemployment rate, and on growing the nation's GDP. The new administration determined that foreign direct investment was critical to these efforts, and, as a consequence, shied away from any actions that it deemed might have the effect of deterring investors.[108] The death knell to the process came in April 2003 when South African President Thabo Mbeki announced that the government would not implement the TRC recommendations regarding business reparations.[109]

Corporations agreed with the government. They thought that 'reparation was not the way to go [and] decided [that] the best way forward was to show that business was serious about transformation. [They] wanted to establish a project in which business could play a catalytic role to achieve agreed objectives'.[110] Finally, corporations, with the support of the government, opted for a model of financial contributions to provide development to the country. It was

[103] Ibid., Vol 4, 55-58; Vol 6, 143, 727. See also, Barnard-Naudé (n 14), 174.
[104] A Boraine, 'Truth and Reconciliation Commission in South Africa Amnesty: The Price of Peace' in J Elster (ed.), *Reparation and Retribution in the Transition to Democracy* (Columbia University Press 2006); Colvin (n 91).
[105] Barnard-Naudé (n 14), 201-02.
[106] Ibid., 174.
[107] JA Carrillo, 'Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past' in de Greiff (n 91), 506.
[108] T Bell and D Buhle Ntsebeza, *Unfinished Business: South Africa, Apartheid, and Truth* (Verso 2003), 348.
[109] Statement by President Thabo Mbeki to the National House of Parliament and the Nation, Cape Town, 15 April 2003. See also, Barnard-Naudé (n 14), 194.
[110] S. Makozoma, 'Winning Trust' in Business Leadership South Africa and National Business Initiative and Business Trust, *Building the Nation: A Business Contribution*, July 2007, 4.

agreed to create a Business Trust so corporations would contribute to the country's reconstruction and provide funds to affected communities, without naming those funds as reparations.[111] The Business Trust ran from 1999 to 2011 and generated R1.2 billion of financial contributions from 140 companies, and additional government contributions.[112] Clara Sandoval argues that although business engagement took place on a purely voluntary basis, the process still demonstrates that corporations can play an active role in reparations.[113] The contributions, however, should not be understood as a form of compensation, given that they were not generated in response to the individual harm suffered by victims, and were not used to redress victims.[114] Thus the Trust was not intended to provide reparations for those affected by corporate-related human rights violations, but was geared instead, towards promoting economic development by attracting foreign investment.[115] Companies insisted that their contribution was referred to as 'nation-building', rather than 'community reparations'.[116]

The failure to address past abuses directly meant that the Trust did not meet a key component of a restorative justice process: that reparations target the perpetrator and repair the harm that was caused.[117] Moreover, as argued by Paul Gready, the focus on economic growth concealed the relational aspect of economic inequality in apartheid South Africa as well as the obligation for beneficiaries, such as businesses, to repay those who were harmed.[118] As a result, this approach paved the way for corporate social responsibility in South Africa, which focused on businesses' contribution to economic development and assisting communities through social interventions, rather than remedying harms and addressing corporate accountability.[119] For example, Koska argues that *Anglo American* was also able to use the Business Trust as a vehicle to promote its own corporate social responsibility agenda and enhance its reputation in South Africa.[120] The failure of the TRC to extract acknowledgement and reparations from *Anglo American* meant that those affected were left without a remedy while the company was

[111] Ibid. See also, Colvin (n 91), 209.
[112] Business Trust of South Africa, 1999–2011 <www.btrust.org.za> (accessed 14 September 2017).
[113] Sandoval and Surfleet (n 80).
[114] Ibid., 101.
[115] Business Trust (n 112). See also, Koska (n 9), 56.
[116] B Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in de Greiff (n 91) 574.
[117] K Clamp, *Restorative Justice in Transition* (Routledge 2014); Koska (n 9), 57.
[118] P Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2001), 220-22.
[119] D Fig, 'Manufacturing Amnesia: Corporate Social Responsibility in South Africa' (2005) 81(3) International Affairs 599.
[120] Koska (n 9), 57.

awarded a special status in the rebuilt of post-apartheid South Africa.[121] David Fig argues that the term 'corporate social responsibility' was then abandoned by most South African corporations in favour of the term 'corporate social investment', in order to divert attention from calls on business to redress the results of its historical contribution to the apartheid system.[122]

Arguably, the TRC intended to punish businesses in a manner different from individuals. As one participant in the hearings noted, '[I]n making findings about business, the TRC adopted a very different approach to culpability and restitution from that it applied to perpetrators of gross human rights abuses'.[123] Whereas apartheid agents (security policemen, members of death-squads) were granted amnesty in return for full disclosure and encouraged to seek reconciliation with victims, the TRC proposed that all businesses, regardless of their different levels of involvement, were to pay a flat tax as compensation for their gains during apartheid.[124] In doing so, the TRC adopted a blanket approach to corporate involvement that equated any profitable activity with prospering under apartheid. In effect, all accumulated wealth was regarded by the TRC as equally deserving of punitive taxation.[125] As Nattrass points out, 'no attempt was made to make the proposed restitutive measures proportional to the different levels of involvement'.[126] This blanket approach meant that corporations that had participated in a relatively benign manner were to be penalized to the same extent as those that had played a more active or even collaborative role. The TRC did not demand greater accountability from the more powerful players. By opting for blanket measures, the TRC effectively 'placed small shops owners in the same group as Anglo-American or Armscor', and proposed punishing them all for having operated in a racially structured environment.[127] As Simcock argues, 'With respect to corporations, the combination of the TRC's recommendations and the government's actions has led to a somewhat perverse form of justice'.[128] Cumulatively, the victims of corporate abuses during apartheid have yet to receive any form of reparations.

[121] Ibid., 59.
[122] Fig (n 119).
[123] Nattrass (n 8), 375, 379, 390-91.
[124] Simcock (n 18), 246-48, 250-54.
[125] South Africa TRC report (n 8), Vol 5, 319.
[126] Nattrass (n 8), 375, 379, 390-91.
[127] Ibid.
[128] Simcock (n 18), 246-48, 250-54.

A justification of the 'blanket approach' approach of the TRC towards businesses is its focus on the systemic nature of their involvement. Terreblanche explains the importance of spelling out the systematic way in which apartheid benefited business:

> Without a clear understanding of the systemic nature of the exploitation that has taken place, it would also not be possible for the beneficiaries (i.e. mainly whites) to make the necessary confession, to show the necessary repentance, to experience the necessary conversion and to be prepared to make the needed sacrifices.[129]

For Terreblanche, the 'necessary sacrifices' entailed the payment of a wealth tax on the grounds that it would be a 'just form of taxation, because it would be levied on wealth accumulated during the period when the structures of white political supremacy and racial capitalism were in place'.[130] This argument in favour of blanket culpability underpinned the TRC report's condemnation of business for benefiting under apartheid, and its recommendations in favour of a wealth tax. Nattrass concludes: 'The South Africa TRC seems to be the only truth commission that took seriously the idea that simply by virtue of operating within the context of a repressive regime, business should bear some accountability for it'.[131]

Although the TRC had no judicial powers to penalise perpetrators for human rights violations, it could grant amnesties.[132] Perpetrators who came forward and admitted their guilt received amnesty against prosecution.[133] But the amnesty provisions were written for individual perpetrators, not collective entities.[134] Whereas apartheid agents were granted amnesty in return for full disclosure and encouraged to seek reconciliation with their victims, the TRC proposed that wealth taxes be considered as appropriate restitution with regard to business. As Lyons points out, 'while the TRC courageously tried to fulfil its mandate to examine systemic abuses, the statute had no built-in incentive, such as amnesty, to encourage business, or other sectors, to fully disclose the truth about their roles under apartheid'.[135] Nor was there a penal alternative, such as the prospect or threat of a criminal prosecution, for failure to tell the truth

[129] South Africa TRC report (n 8), S Terreblanche, Testimony, 26.
[130] Ibid., S Terreblanche, Fax to Dr Fazel Randera, 8 July 1998, 1.
[131] Nattrass (n 8), 246-48, 250-54.
[132] South Africa TRC Act (n 15), Ch 4, 'Amnesty Mechanisms and Procedures'.
[133] Ibid., 3. See also, S Michalowski, 'No Complicity Liability for Funding Gross Human Rights Violations?' (2012) 30 Berkeley J Intl L 451; Lyons (n 8), 137-41.
[134] South Africa TRC Act (n 15), Ch 4, Sect 20.
[135] Lyons (n 8), 137-41.

and seek amnesty.[136] Without the incentive of amnesty or the threat of criminal prosecution, there was 'nothing to hold over businesses' heads'.[137]

Arguably, the South Africa TRC missed the opportunity to elicit significant new information on the way in which business committed abuses during apartheid.[138] The hearing did provide important insights into the manner in which apartheid reached into the business sector. But the analysis and findings are not extensive. Barnard-Naudé argues that the TRC treatment of the business sector can be understood as an exercise in forgetting 'ahead of itself'.[139] Read in isolation, the few pages that make up the TRC report account of the role of business in apartheid appear strong, he says.[140] However, a closer look at the TRC treatment of the business sector reveals that it fails to paint an adequately vivid picture of business involvement in apartheid. The TRC report, for example, did not attempt an integrated analysis to address the complex power relationship of apartheid, including the consequences of job reservation, wages, unequal access to resources, and migrant labour.[141] The report affirms that business supported and benefitted from apartheid, but it did not come to any overall conclusion as to whether the economic system was deliberately designed with the collusion of the business sector to produce white beneficiaries and black victims.

Symptoms of the same inattention are reflected, Barnard-Naudé continues, in the TRC's distinction between first, second and third order of involvement.[142] He argues that the distinction masks human rights violations perpetrated in the economic sphere by representing them as mere involvements being more or less culpable than others, while the concept of responsibility is not open to evaluation of different degrees. The 'invention' of these categories on involvement ultimately worked against disclosure.[143] The TRC understood big business as beneficiaries instead of perpetrators of apartheid.[144] Business stressed that the TRC mandate was to investigate 'gross violations of human rights' during apartheid and took the

[136] Ibid.
[137] Ibid., 159-60.
[138] Chapman (n 58), 182.
[139] Barnard-Naudé (n 14), 173, 176.
[140] Ibid.
[141] Business Hearing (n 45), 18A. See also, Chapman (n 58), 184.
[142] Barnard-Naudé (n 14), 180.
[143] Ibid.
[144] Ibid., 186.

view that this required investigation of active, deliberate participation by individuals.[145] As Terreblanche points out, the TRC instead of challenging this understanding, effectively endorsed it.[146]

Koska also argues that the TRC lacked the independence and authority to formally sanction businesses found to have committed human rights violations, and in particular the egregious labour violations committed in the mining industry.[147] In South Africa, the exploitation of labour provided by the majority black population became synonymous with apartheid and in 1980 the UN described the apartheid system as a modern form of slavery.[148] But international human rights instruments condemning apartheid were not invoked in the business hearings.[149] Mining companies built a compound system, which was compared to prisons and concentration camps, allegedly to restrict the free movement of the workers.[150] Health and safety standards were not observed, especially for the majority of black workers, thus contributing to respiratory diseases, including tuberculosis, and a silicosis 'epidemic' within the gold mining industry.[151] While the TRC was not focused on investigating business participation in human rights violations, the TRC Act could be read as including businesses within the scope of the Commission's investigations.[152] Section 4 empowered the TRC to facilitate, initiate or coordinate inquiries into systematic human rights violations.[153] Included within the mandate, was the investigation into the 'identity of all persons, authorities, institutions and organisations involved in such violations'.[154] Some commentators argue that within the scope of its mandate, the TRC could have formally investigated allegations of

[145] South Africa TRC Act (n 15), Sect. 1.
[146] S Terreblanche, *A History of Inequality in South Africa. 1652–2002* (University of Natal Press 2002), 127.
[147] J Braithwaite, *Crime, Shame, and Reintegration* (Cambridge University Press 1989).
[148] UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Apartheid as a Collective Form of Slavery, Report of the Secretary-General, UN Doc E/CN.4/Sub.2/449, 18 July 1980, 59.
[149] The Additional Protocol I of 1977 to the Geneva Conventions of 1949 designated apartheid as a crime against humanity. The Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 explicitly identified the 'exploitation of the labor of the members of a racial group or groups, in particular by submitting them to forced labor' as a crime of apartheid, International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), Article III. South Africa was a signatory to the Convention to Suppress the Slave Trade and Slavery (1926) and its Protocol (1953), which prohibited slavery and its promulgation through forced labour.
[150] F Johnstone, *Class, Race, and Gold: A Study of Class Relations and Racial Discrimination in South Africa* (Routledge 1976); Terreblanche (n 146), 261.
[151] G Churchyard and others, 'Silicosis Prevalence and Exposure-Response Relations in South African Goldminers' (2004) 61(10) Occupational Enviro Medicine 811, 812; J McCulloch *South Africa's Gold Mines & The Politics of Silicosis* (Woodbridge 2012).
[152] C Abrahams, 'The TRC's Unfinished Business' in Villa-Vicencio and du Toit (n 84), 34.
[153] South Africa TRC Act (n 15), Sect 4.
[154] Ibid., Sect 4 (a)(iii).

labour violations.[155] The Commission, instead, chose to adopt a narrow definition of gross human rights violations and focused on isolated occurrences of physical violence. This choice had the effect of overlooking the responsibility of those who benefited from the system of apartheid.[156] The TRC lacked independence, authority or the capacity to compel corporations to redress harms, and as a result, corporations were able to evade accountability.[157]

Critics also point at the short time set aside for hearing submissions on the role of business. Only three days were allocated for the accounts of decades of complicity of business with the apartheid government. Terreblanche argued:

> In the end the TRC devoted only three days of its life span of two and a half years to public hearings on the role of business in the apartheid era. Not surprisingly, the hearings were conducted in a way that obscured the systemic character of apartheid, and offered business people an undeserved opportunity to clear themselves and their corporations of any guilt in respect of or responsibility for the legacy of apartheid.[158]

Some scholars further argue that the TRC was used as a platform for businesses to transition into post-apartheid South Africa without having to deliver either truth or reparations.[159] For example, when *Anglo American*, one of South Africa's largest multinational corporations, was questioned at the business hearing, it employed 'amnesia' and other tactics to craft its own narrative and control the truth-telling process.[160] The business hearing claimed to be permeated with the spirit of reconciliation and corporations were directly invited to take responsibility and ask for forgiveness.[161] For workers, represented by the Congress of South African Trade Unions (COSATU), reconciliation was based on the recognition that businesses were responsible for discriminatory labour practices, especially in the mines, and the exploitation of

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[155] Koska (n 9).
[156] Gready (n 118); M Mamdani, 'The Truth According to the TRC' in I Amadiume and A Na'im (eds.), *The Politics of Memory: Truth, Healing, and Social Justice* (Zed Books 2000), 176.
[157] Koska (n 9), 52; Y Farah 'Toward a Multi-dimensional Approach to Corporate Accountability' in Michalowski (n 79), 29.
[158] Terreblanche (n 146), 128.
[159] Koska (n 9); Fig (n 119).
[160] Payne (n 52), 299-339; Koska (n 9), 44, 54.
[161] Business Hearing (n 45), Day 1. See also, J Renner, 'A Discourse Theoretic Approach to Transitional Justice Ideals: Conceptualising 'Reconciliation' as an Empty Universal in Times of Political Transition' in N Palmer, P Clark and D Granville (eds.), *Critical Perspectives in Transitional Justice* (Intersentia 2012), 51, 55,

resources.[162] Members from COSATU made several references to their capacity to forgive on the condition that *Anglo American* took responsibility for labour violations in the mines.[163] Representatives from *Anglo American* accepted responsibility for their failure to support the desegregation of the industry, but they failed to respond to the specific allegations made by COSATU.[164] As a result, reconciliation was 'posited as the necessity for black South Africans to forgive, rather than Anglo American accepting blame for violations'.[165]

The political and economic context in which the TRC was established limited the Commission's capacity to exercise its authority over corporations. The TRC lacked the necessary independence from the political interests of the National Party or the African National Congress in order to be an effective arbitrator over major businesses connected to the dominant elites of the apartheid era.[166] Because the TRC was reliant on the government to implement recommendations, it had no power to compel the corporations to act and remained powerless to achieve accountability and deliver reparations when the government did not implement any of the TRC's recommendations concerning business.[167] As a non-judicial commission dealing with a business sector, on which the new South African government was disproportionately dependent, the TRC had no leverage on its own.[168] The 'new' position of business as a partner of government in the transformation controlled the process.[169] The TRC's approach to justice can be seen as the product of political and economic circumstances at the end of apartheid, and the transitional justice process arguably had little appetite for pursuing corporate accountability.[170] These conditions came to define the Commission's role in shaping the image of post-apartheid South Africa and limited its capacity to be an effective arbitrator

[162] Business Hearing (n 45), Sam Shilowa, NARSSA, 13 November 1997, Tape 11, 13:15.
[163] Ibid., Tape 11, 47:25.
[164] Ibid., Bobby Godsell, NARSSA, Tape 12, 1:08:04.
[165] South Africa TRC report (n 8), Vol 4, 36.
[166] H Van der Merwe, 'What Survivors Say About Justice: An Analysis of the TRC Victim Hearings' in H Van der Merwe and A Chapman (eds.), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Press 2008), 23, 26; Koska (n 9), 44; K Asmal, L Asmal and R Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* (David Philip 1996), 156- 57.
[167] C Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' (2017) 21(4) Global Society 579; Koska (n 9), 44.
[168] Lyons (n 8), 159-60.
[169] Ibid.; H Marais, *South Africa, Limits to Change, The Political Economy of the Transformation* (Zed Books 1998), 259.
[170] N Roht-Arriaza, 'Why Was the Economic Dimension Missing for so Long in Transitional Justice? An Exploratory Essay' in JP Bohoslavsky and H Verbitsky (eds.), *The Economic Accomplices to the Argentine Dictatorship* (Cambridge University Press 2005), 19.

for corporate crimes.[171] A major issue for South Africa remains the legacy of the TRC and its 'unfinished business'.[172] The legacy of the complex power relationship of apartheid continues to afflict the post-apartheid society.[173]

IV.2 Other Truth and Reconciliations Commission and Truth-seeking Bodies

The South Africa TRC was the first truth commission to include findings related to business involvement in abuses and to recommend reparations from companies in its report. As such, despite the limitations listed above, it assumed an innovative mandate and provided important precedents. Later truth-seeking bodies, established in Liberia, East Timor, Sierra Leone, Argentina, and Brazil (analysed in the following sections), adopted a similar approach, although their recommendations have been, for the most part, ignored by the government.

Liberia Truth and Reconciliation Commission

Liberia is a classic example of a country that suffers from the proverbial 'resource curse', as well as a case where resources perpetuated the conflict and continue to play into the risk of conflict recurrence.[174] Part of the mandate of the Liberian TRC was to look at 'economic crimes', such as the plunder exploitation of natural resources, which allowed it to examine the role played by corporations.[175] According to the TRC report,

[171] B Harris, The Archive, Public History and the Essential Truth: The TRC Reading the Past' in C Hamilton (ed.), *Refiguring the Archive* (Kluwer Academic 2002), 161; Payne (n 51); Koska (n 9), 61.
[172] Y Sooka, 'The TRC's Unfinished Business: Prosecutions' in Villa-Vicencio and du Toit (n 84), 17.
[173] On 16 August 2012, in Marikana, the South African police killed 34 platinum miners who were striking against mining company Lonmin demanding better wages. New Yorker, 'A massacre and a test for South Africa', 21 August 2012; P Alexander, 'Marikana, Turning Point in South African History' (2013) 40(138) Review of African Political Economy 605.
[174] SS Nichols, 'Reimagining Transitional Justice for an Enduring Peace: Accounting for Natural Resources in Conflict' in DN Sharp (ed.), *Justice and Economic Violence in Transition* (Springer 2014) 203, 211; SL Altman, SS Nichols, and JT Woods, 'Leveraging High Value Natural Resources to Restore the Rule of Law: The Role of the Liberia Forestry Initiative in Liberia's Transition to Stability' in P Lujala and SA Rustad (eds.), *High-Value Resources and Post-conflict Peacebuilding* (Earthscan 2012), 337.
[175] Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, National Transitional Legislative Assembly on May 12, 2005, Art. 4(a). The TRC defines an economic crime as 'i) Any prohibited activity committed for the purpose of generating economic gains or that in fact generates economic gains… ii) any activity by a public or private person of any nationality, or domestic or international corporate entity conducting or facilitating business in or related to Liberia, or on behalf of the Liberian government, a Liberian business, or Liberian resident or citizen, committed with the objective of generating illicit profit.' See also E Schmid, 'Liberia's Truth Commission Report: Economic, Social, and Cultural Rights in Transitional Justice' (2009) 19 Fletcher J Human Security.

> An economic crime is any prohibited activity committed for the purpose of generating economic gain or that in fact generates economic gain by persons and actors whose economic activities contributed to gross human rights and/or humanitarian law violations in Liberia or that otherwise perpetuated armed conflict in Liberia, as well as those who benefited economically from armed conflict in Liberia. They include public and private persons, national and private corporations, and other business entities.[176]

In particular, the report analysed crimes that occurred within the rubber, timber and mining sectors.[177] Resource control and mismanagement by government and multinational corporations played a major role in the Liberian civil conflict. Throughout the period of conflict between 1979 and 2003, examined by the TRC, these resources benefitted only a small elite group of Liberians, and selected companies.[178] Control of natural resources served as a motivating factor in the war, and those resources funded the armed groups perpetrating the conflict, particularly Charles Taylor's National Patriotic Front of Liberia. Successive Liberian governments were either unwilling or unable to govern and manage critical economic sectors. As a result, the TRC found, warring factions gained effective control over the timber and mining sectors and unlawfully transferred authority to exploit the resources to individual and corporate actors that conducted business in an unregulated environment, and played a crucial role in contributing to the conflict in Liberia.[179] In many instances joint corporate ventures were formed with perpetrators of grave human rights violations.[180] The Commission also found evidence that security forces associated with mining companies committed grave violations of human rights.[181] The TRC concluded that warring factions, government agencies, Liberian and foreign individuals, and corporate actors committed economic crimes in a widespread and systematic manner.[182]

In particular, the report detailed the impact of illegal timber exploitation during the conflict. Timber is one of Liberia's most significant natural resources and is a central source of government revenue. Between 1979 and 2003, timber comprised over 50% of the country's

[176] Liberia TRC report (n 8), Vol II, 370, para 16.1.
[177] Ibid., Vol III, Title III: 'Economic Crimes and the Conflict, Exploitation and Abuse'.
[178] Ibid., Vol III, Title III, paras 2, 138.
[179] Ibid., paras 135-36. The TRC concluded, 'The perpetration of economic crimes in Liberia fuelled violent conflict both domestically and throughout the region'. Ibid., para 134.
[180] Ibid., paras 3-4.
[181] Ibid., para 81.
[182] Ibid., para 137.

reported exports.[183] The TRC found that the timber sector contributed to the conflict in Liberia in several ways. Political elites and warring factions used logging revenue to fund the armed conflict. Logging companies shipped, or facilitated the shipment of weapons and other military material to warring factions and utilized security forces that operated as militia units and that committed grave human rights abuses in Liberia.[184]

In its final report published in 2009, the TRC recommended that the government conduct a concession review of the mining sector to discover the extent of money laundering, bribery and other economic crimes within it, to calculate tax arrears by corporations, to determine whether mineral companies complied with Liberian law, and to document corruption, illegality and mismanagement.[185] The report included a list of 26 individuals and 19 corporations in the timber, maritime, rubber, petroleum and telecommunications sectors that allegedly committed 'economic crimes' (among them, the companies *Firestone and Oriental* and *Royal Timber*, and their president Guus Kouwenhoven, then prosecution in The Netherlands as discussed in Chapter III).[186] The Commission recommended that the government 'aggressively pursue' civil and criminal actions against them.[187] Recognizing the problem of the limited *fora* for corporate accountability, the Commission recommended the inclusion of legal entities in the jurisdiction of a proposed 'Extraordinary Criminal Court for Liberia' and called upon other countries to apply universal jurisdiction to pursue corporate offenders.[188] Finally, however, the government did not initiate any judicial case against those individuals and corporations.

The commission did not explicitly link the human rights violations by corporations with an obligation to provide reparations.[189] But it called on the government to establish a Reparations Trust Fund to compensate victims.[190] The Commission suggested that the Fund could obtain sources through four ways. First, recovering tax arrears from timber, mining, petroleum and telecommunications companies that evaded tax liability under the Taylor regime. Second,

[183] Ibid., para 18.
[184] Ibid., para 19.
[185] Ibid., paras 166-68.
[186] Ibid., Vol II, 368-70. See also, Global Witness, 'Bankrolling Brutality: Why European Timber Company DLH Should Be Held to Account for Profiting From Liberian Conflict Timber' (2010).
[187] Liberia TRC report (n 8), Vol II, 372.
[188] Ibid., 426-59.
[189] Ibid., Vol II, title IV, sect 17. See also, Sandoval and Surfleet (n 77), 103.
[190] Liberia TRC report (n 8), Vol. III, Title III, 43, para 158.

obtaining funds from 'economic criminals' sentenced by Liberian courts to pay restitution or other fees.[191] To that end, the TRC recommended that the government of Liberia 'aggressively seek restitution from individuals and corporate actors that perpetrated economic crimes.'[192] Third, as an alternative to prosecution, the commission suggested that perpetrators of economic crimes could apply to the Liberia National Human Rights Commission for the purpose of making restitution 'of the full sum of all gains from their engagement in such economic crimes'.[193] Forth, the Commission recommended that the government 'aggressively seek to trace, identify and freeze assets of those individuals and entities that committed economic crimes in Liberia' and to use both criminal confiscation laws in Liberia and civil forfeiture laws in the countries where stolen assets are located to recover funds to be repatriated to Liberia.[194] To freeze assets the TRC also encouraged the government to utilize processes established by the UN *Convention Against Corruption* and recommended that any funds frozen under UN sanctions not be released until the new government had the opportunity to collect tax arrears.[195] The Convention codifies norms on the recovery of ill-gotten assets and against large-scale corruption.[196] These norms apply not only to individual dictators with ill-gotten assets or leaders of armed groups who may be implicated in pillage; they also explicitly cover banks and financial institutions and the profits that are the products of human rights violations or international crimes.[197] Often private companies directly or indirectly take advantage of a conflict to exploit resources and illegitimately accumulate assets.[198] Arguably, if those actors are found responsible, it is legitimate for a transitional government to attempt to trace and confiscate their assets to fund reparations programmes.[199] For example, the reparation programme in the Philippines is being funded using $200 million out of the $680 million recovered from the Marcos family's assets in Switzerland.[200]

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[191] Ibid., para 160.
[192] TRC report Vol. III , Title III Recommendations: 157: TRC of Liberia, Consolidated Final Report, sec. 16
[193] Ibid., para 157.
[194] Liberia TRC report (n 8), Vol III, Title III, 43-45, paras 158-61.
[195] Ibid., 44-45.
[196] UN Convention Against Corruption (UNCAC), UN General Assembly Resolution A/RES/58/4, entered into force 14 December 2005, Art. 51.
[197] JL Černič, 'Sovereign Financing and Corporate Responsibility for Economic and Social Rights' in JP Bohoslavsky and JL Černič, *Making Sovereign Financing and Human Rights Work* (Hart Publishing 2014).
[198] NC Sanchez, 'Corporate Accountability, Reparations and Distributive Justice in Post Conflict Societies' in Michalowski (n 79), 116-17.
[199] N Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in Sharp (n 174), 109, 137; Carranza (n 7), 324; A Kora, 'Dealing With a "New" Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?' (2012) 11(4) J Human Rights 537.
[200] Decree of Urgency No. 122-2001, Art. 10 (iii) and (iv). See also, Carranza (n 7), 325.

In the end, the government of Liberia, as in South Africa, did not implement the TRC recommendations regarding reparations programmes. The government rejected legislation that would have given it the power to freeze assets.[201] The course of the transition in Liberia is another relevant example of the challenge in balancing the need for justice and the need to attract foreign investment in a post-conflict society. Ellen Johnson Sirleaf, Liberian president and winner of the Nobel Peace Prize, became known as a hero of Liberia's post-conflict recovery for successfully rebuilding a country destroyed by decades of conflict. 'Liberia's leading lady' succeeded in bringing high levels of aid and foreign investment into the country. Yet Johnson Sirleaf was also the target of many critical voices within Liberia. The Liberian TRC recommended that she be barred from office for her role in supporting war criminal Charles Taylor. In 2012, days after Johnson Sirleaf was elected for a second term as Liberia's president, the *New York Times* published an op-ed by two Liberian land rights campaigners, Silas Siakor and Rachel Knight.[202] They claimed, 'Mrs. Johnson Sirleaf's government may now be sowing the seeds of future conflict by handing over huge tracts of land to foreign investors and dispossessing rural Liberians'.[203] Between 2006 and 2011, Sirleaf had granted more than a third of Liberia's land to private investors for logging, mining and agro-industrial enterprises.[204] These concessions to foreign investments displaced thousands of people at a time when violent local-level land disputes were still widespread throughout Liberia.[205] Given the role that resource control played in the Liberian conflict, addressing abuses within those sectors was arguably critical to breaking down norms of impunity and achieving a sustainable transition. But as Siakor and Knight pointed out, policy in Liberia was geared toward attracting foreign investment rather than responding to Liberians' need of justice.[206]

East Timor Commission for Reception, Truth and Reconciliation

The mandate of the Commission for Reception, Truth and Reconciliation in East Timor (*Commissão de Acolhimento, Verdade e Reconciliacão* - CAVR) included looking into the 'context, causes, antecedents, motives and perspectives' that led to human rights violations

[201] I Al-bakri Nyei, 'Liberia after the Civil War: Victims Demand for Reparation' (2011) 1 Conflict Trends 1, 43, 46-49; P James-Allen, A Weah, and L Goodfriend, *Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia* (ICTJ 2010), 3.
[202] New York Times, 'A Nobel's Laureate's Problem at Home', 20 January 2012.
[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] Ibid.

that took place in the context of the political conflicts between 1974 and 1999.[207] As part of this mandate, CAVR examined the role in human rights violations committed by a number of actors in East Timor and Indonesia, including 'members of opposition groups, political parties, militias, corporations and other individuals'.[208] The commission found that human rights violations did not occur only as a consequence of military operations but were 'intertwined with private and corporate interests,' including the Indonesian military's partnerships with business in the coffee, timber, and oil sectors.[209]

Coffee has been East Timor's single most important source of tax revenue, foreign exchange and local cash income since the late 19th century. A single company, *Sociedade Agrícola Pátria e Trabalho* (SAPT), dominated the production and export of plantation crops under Portuguese administration.[210] Although founded as a private venture, SAPT behaved as if it were a state company by virtue of its association with the governor. Using the authority and resources of the state, SAPT seized the most productive land for coffee, and instituted a programme of forced cultivation, overseen by the military. Later rebellions against or inability to pay the poll tax were punished by forced labour on coffee plantations.[211] State proxies had special arrangements with the Indonesian military, which gave them control of the coffee production and trade, in return for supplying 'off-budget' funds for military operations. CAVR found that revenues from the coffee industry 'financed the military campaign in East Timor as well the military's…repression of the local population'.[212] In addition to control of coffee, the military was also involved in the looting of East Timor's natural resources including sandalwood, timber and oil.[213] The commission found that the private sector, including British and French arms companies who supplied arms to the regime, profited from commercial relations with Indonesia under the Suharto government.[214] By shedding light on the responsibilities of the private sector, CAVR was able to establish a more truthful account of the conflicts in East Timor.[215]

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[207] CAVR East Timor, *Chega!* (n 8), part 2: 'The Mandate of the Commission', para 2, 1.
[208] Ibid., paras 4, 8.
[209] Ibid., Ch 7.9: 'Economic and Social Rights'.
[210] J Joliffe, *East Timor: Nationalism and Colonialism* (University of Queensland Press 1978), 39-41.
[211] W Clarence-Smith, 'Planters and Smallholders in Portuguese Timor in the Nineteenth and Twentieth Centuries' (1992) 57 Indonesia Circle, 15-30.
[212] CAVR East Timor, *Chega!* (n 8), Part 2, 12.
[213] Ibid., Ch 7.9, paras 27-29, 45.
[214] Ibid., Part 2, 95, 50. See also, Darcy (n 4), 52-53.
[215] Carranza (n 7), 319-21.

CAVR made a direct link between the violations corporations committed or aided and abetted, and their obligations to provide reparation.[216] The Commission noted that corporations that 'profited from war and benefitted from the occupation' had a legal obligation to provide reparations to victims.[217] It referred specifically to corporations that profited from the sale of weapons, and corporations that 'supported the illegal occupation of Timor-Leste and thus indirectly allowed violations to take place.'[218] The Commission recommended that the reparation scheme be jointly funded by the state, privately owned Indonesian business, and multinational corporations.[219] Like in South Africa and Liberia, however, little progress was made in implementing the programme and a draft law on compensation to victims awaits enactment by the parliament.

Sierra Leone Truth and Reconciliation Commission

The Sierra Leone TRC also constituted an important attempt to deal with the root causes of conflict or repression and the role of different actors. In accordance with the *Truth and Reconciliation Commission Act*, the TRC was mandated 'to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict' from 1991 to the signing of the Lomé Peace Agreement'.[220] To that end, it was to look into 'the causes, nature and extent of the violations…[and] the context in which the violations…occurred', as well as into the role played by different actors in the conflict.[221] At the beginning of its work, the Sierra Leone TRC considered that 'perpetrators may be both natural persons and corporate bodies, such as transnational companies or corporations' and that its mandate was not 'limited to violations committed by States or governments.'[222] In its final report *Witness to Truth* the Commission found that the conflict happened because of the 'endemic greed, corruption and nepotism that deprived the nation of its dignity and reduced most people to a state of poverty.'[223] The TRC found that 'successive political elites plundered

[216] Ibid., Part 11: 'Recommendations', 42.
[217] Ibid.
[218] Ibid., 34.
[219] Ibid., 4, 42. See also, Sandoval and Surfleet (n 79), 104-05.
[220] Parliament of Sierra Leone, Truth and Reconciliation Commission Act (2000), Supplement to the Sierra Leone Gazette Vol. CXXX, No. 9, Sect 6(1).
[221] Ibid.
[222] Sierra Leone Truth and Reconciliation Commission, *Witness to Truth* (2004) [Sierra Leone TRC, *Witness to Truth*], Vol 2, Ch 2, para. 13.
[223] Ibid.

the nation's assets, including its mineral riches at the expenses of the national good'.[224] It looked at the role of mineral resources, in particular diamonds, in fuelling the conflict.[225]

William Schabas argued that a 'useful contribution' of the commission's report was to 'debunk some of the myths of the conflict'.[226] One of these myths was related to the role of 'conflict diamonds'. The prevailing view among external observers, journalists and NGOs was that diamonds were at the root of the war in Sierra Leone.[227] The Commission concluded otherwise, noting that the rebel groups did not focus on controlling the diamondiferous regions until the final years of the conflict.[228] Because diamonds were central to the country's economy, they were inevitably a factor in conflict, but their role was largely overstated. Indeed, for much of the conflict, diamond smuggling remained under the control of the corrupt Freetown elite, where it had always been.[229] The commission found it important to emphasize, however, that this did not feature highly in the early years of the conflict, ultimately concluding that while diamonds helped to fuel and sustain the conflict, plunder was not the driving factor that precipitated the RUF's initial brutal campaign.[230]

The TRC recommended specific reforms of the country's mining sector including transparency, protection against corruption, certification of diamonds, and investment of diamond revenue in rural development.[231] It recommended the establishment of a rough diamond chain-of-custody system, which eventually developed into the Kimberley Process Certification Scheme, a global regulatory framework for tracking the diamond trade to ensure that diamonds were not acquired illicitly.[232] The Commission also proposed that 'the revenue generated from mineral resources', in addition to 'seized assets from convicted persons' who

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[224] Ibid., 27.
[225] Ibid., Vol. 2, Ch 2, 89; Vol. 3A, Ch 3, 203; Vol. 3B, Ch 1, 26-27, 68-69. See also, Darcy (n 4), 53.
[226] WA Schabas, 'The Special Court for Sierra Leone: Testing the Waters. Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 J Intl Crim Just 1082-88.
[227] I Smillie, L Gberie, and R Hazelton, *The Heart of the Matter: Sierra Leone, Diamonds and Human Security* (Partnership Africa/Canada 2000).
[228] Sierra Leone TRC, *Witness to Truth* (n 222), Vol. I, 12.
[229] Schabas (n 226), 1082-88.
[230] Sierra Leone TRC, *Witness to Truth* (n 222), Vol. I, 12.
[231] Sanchez (n 198), 124; E Harwell and P Le Billon, 'Natural Connections: Linking Transitional Justice and Development Trough a Focus on Natural Resources' in P de Greiff and R Duthie, *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009), 282, 301; R Maconachie, 'The Diamond Area Community Development Fund: Micropolitics and Community-Led Development in Post-War Sierra Leone' in Lujala and Aas Rustad (n 174), 264.
[232] JA Grant, 'Kimberley Process at Ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds' in in Lujala and Aas Rustad (n 174); Nichols (n 174), 219.

'profited from the conflict', would be used to fund reparations programmes.[233] This recommendation was not implemented.

UN Experts Panel on the Exploitation of Natural Resources in the Democratic Republic of the Congo

In addition to TRCs, UN-mandated investigations have also looked at the exploitation of natural resources by different actors, including companies. In 2012, the UN Security Council established a Panel of Experts to look into on the illegal exploitation of natural resources in the Democratic Republic of the Congo (DRC).[234] The Panel identified three distinct 'elite networks' - powerful groups consisting of political and military elites and businesspeople, engaged in natural exploitation activities in three different areas controlled by the government of the DRC, Rwanda and Uganda.[235] The Panel compiled an extensive list of business enterprises and individuals involved in the commercial activities of the three elite networks active in the DRC.[236] It found that 157 corporations were directly or indirectly involved in illegal exploitation of natural resources, which enabled rebel groups to buy arms and commit war crimes and crimes against humanity.[237] By adding to the revenues of the elite networks, directly or indirectly, those companies and individuals contributed to the conflict and to human rights abuses.

In particular, in the area controlled by the government of the DRC, an elite network of Congolese and Zimbabwean government officials and private businesspeople exploited key mineral resources.[238] According to the Panel, this network transferred ownership of at least $5 billion of assets from the state mining sector to private companies under its control.[239] The Panel found that the richest and most readily exploitable of the publicly owned mineral assets of the DRC were moved into joint ventures controlled by the network's private companies.[240] 'These transactions, which are controlled through secret contracts and off-shore private companies, amount to a multi-billion-dollar corporate theft of the country's mineral assets',

[233] Sierra Leone TRC, *Witness to Truth* (n 222), Vol 2, Ch 4, 269.
[234] UN Security Council, Resolution 1291 (2000) of 24 February 2000.
[235] Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Final report UN Doc. S/2002/1146, 16 October 2002 [DRC Panel of Experts report], paras 5, 20, 21.
[236] Ibid., 174.
[237] UN Security Council, S/2003/1027, 15 October 2003.
[238] DRC Panel of Experts report (n 235), para 25.
[239] Ibid., para 22.
[240] Ibid., para 35.

the Panel concluded.[241] Some 30 businesspeople, politicians and military officers were the main beneficiaries of the arrangements. The Panel found that several joint venture mining companies had strong links with the military supply companies that facilitate their operations in the DRC, and that diamond revenues were used to pay for arms purchases for the armed groups.[242] In particular, the armed conflict between members of the Hema and Lendu clans stem, in part, from attempts by powerful Hema businessmen and politicians to increase the benefits they derived from the commercial activities of the elite network through their front companies, the *Victoria Group* and *Trinity Investment*, in the Ituri area.[243]

The Panel recommended that the UN Security Council consider imposing restrictions on those business enterprises and individuals involved in illegal exploitation of natural resources, including barring them from accessing banking facilities and other financial institutions and from receiving funding or establishing a partnership or other commercial relations with international financial institutions.[244] It recommended reforms of the mining and forestry sectors, including the review of all concessions and contracts signed during the wars, and the monitoring by specialized industry organizations of commodities from conflict areas.[245]

In 2003, after the publication of the Panel's report, the Security Council released a document containing the reactions to the report.[246] According to it, the international business community…acknowledged that companies could not avoid their responsibility in a country suffering from conflict such as the Democratic Republic of the Congo. Investors and financiers took a keen interest in the activities of corporations in the Democratic Republic of the Congo with which they were dealing. Companies themselves commented that their responsibilities extended further that they had previously acknowledged. Supply chains of raw materials, in particular came into sharp focus and prompted some of those named to reassess their activities in the Democratic Republic of the Congo'.[247]

The wording of this statement is vague and generic and it is clear that in reality companies and

[241] Ibid., para 36.
[242] Ibid., para 54.
[243] Ibid., para 118.
[244] Ibid., 175-76.
[245] Ibid., paras 168, 180-82. See also, Final report of the Group of Experts on the Democratic Republic of the Congo, pursuant to Security Council resolution 1698 (2006) S/2007/423 18 July 2007, 173.
[246] UN Security Council, S/2003/1027, 15 October 2003.
[247] Ibid., para 11.

investors did not commit to any concrete action. The Security Council initiative indeed had a limited effect in bringing about accountability for corporate exploitation.[248] International financial institutions, such as the World Bank and the International Monetary Fund, whose focus in the DRC, as in other in post conflict countries, is on securing foreign investments, have been unwilling to review and renegotiate contracts in the DRC, despite evidence of unaccountability, for fear of scaring off western investors.[249] Companies involved were not investigated and the people of the DRC, who suffered the impact of the exploitation, were not provided with any form of remedy.

Brazil National Truth Commission

In 2012, Brazil's President Dilma Rousseff established a National Truth Commission (NTC) to investigate abuses during the 1964-1985 dictatorship.[250] The Brazilian Secretary of Justice urged the NTC to also 'investigate the corporations that financed the dictatorship'.[251] A few months later, the NTC announced the creation of a task force to investigate the role of companies and businesspeople during the repression.[252] The commission reported a pattern of violence and repression against workers and unions, including cases of arbitrary arrests, extrajudicial killings, and forced disappearances committed by the regime, in some cases with the collusion of companies.[253] The commission reported a process of 'militarization' of the factories, based on surveillance and found documents showing that a number of companies, including *Volkswagen*, *Ford*, *Toyota* and *Mercedes-Benz*, helped the military to identify and repress suspected 'subversives' and union activists by monitoring workers, passing on information about them and handing them to the Department of Political and Social Order (DOPS), a police intelligence agency.[254] Of particular importance was the discovery in São Paulo state's archives, of a document that researchers called 'the black lists' - with the names and home addresses of workers dismissed for political reasons – which was put together by DOPS with information provided by the companies.[255]

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[248] R Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 Intl J Trans Just 253, 258.
[249] Ibid.
[250] Government of Brazil, Law no. 12.528, 18 November 2011.
[251] Viomundo, 'Paulo Abrão: Comissão da Verdade deve investigar empresas que financiaram a ditadura' 17 October 2011.
[252] Folha de S.Paulo, 'Empresários que apoiaram tortura serão investigados' 25 September 2012.
[253] Commissão Nacional de Verdade, *Relatório*, 10 December 2014, Vol 2 Texto 2: 'Violações de direitos humanos dos trabalhadores', paras 65-68.
[254] Ibid., paras 67-69, 80, 81.
[255] Ibid., para 66.

Further, investigations by the NTC are shedding light on how public works made or supported by the regime led to human rights violations, including the death and disappearance of farmers, and indigenous people.[256] In both cases, there is a clear connection between the economic policy of the regime, private actors (corporations, lenders and businesspeople) that exploited economic opportunities created by the regime, and human rights violations that occurred - not only deaths and disappearances, but also corruption and destruction of natural resources.[257] Arguably, in carrying out such investigations, the NTC is better fulfilling its goals of historical accountability, and may also open new possibilities for civil and criminal accountability against perpetrators and their economic accomplices.[258] Scholars have also called for the NTC to specifically address the issue of financial complicity, something within its power.[259] The NTC has the mandate to recommend changes in the institutional design of financial institutions, both in terms of regulatory measures to be enforced over private actors and the articulation of new standards and policies to be complied with by state banks and enterprises.[260]

On the Horizon: New Truth Commission in Argentina

The truth and justice process in Argentina began in 1982 with the trial of the military junta and the investigations on the disappearances of persons by CONADEP.[261] Later innovative uses of transitional justice mechanisms have started to link corporations to the abuses committed by the dictatorship during Argentina's *Dirty War*. As detailed in Chapter III, a number of national and multinational corporations now face criminal prosecutions and civil claims in Argentinian and US courts over their alleged involvement in human rights violations during the dictatorship. This new wave of justice calls in Argentina has also led to the establishment of further truth-seeking initiatives on corporate complicity.

In December 2015, one week before leaving office the then-President of Argentina, Cristina

[256] EBC, '1,2 mil camponeses mortos e desaparecidos entre 1961 e 1988' 27 September 2012.
[257] JP Bohoslavsky and MD Torelly, 'Financial Complicity: The Brazilian Dictatorship Under the "Macroscope"' in Sharp (n 174), 233, 257.
[258] Ibid., 262.
[259] Ibid., 254-57 JS Henry, *The Blood Bankers: Tales from the Global Underground Economy* (Four Walls Eight Windows 2005), 127–77; Carranza (n 7); IV Prado Soares and L Bastos, 'A Verdade ilumina o Direito ao Desenvolvimento?: Uma análise da potencialidade dos trabalhos da Comissão Nacional da Verdade no cenário brasileiro' (2011) 6 Revista Anistia Política e Justiça de Transição.
[260] Bohoslavsky and Torelly (n 257), 254.
[261] CONADEP, *Nunca Más* (1984).

Fernández de Kirchner signed a bill into law, mandating the establishment of a new truth commission.[262] If established, the commission would also be tasked with investigating 'economic complicity': more specifically, the role and responsibility of businesses for violations that occurred during the dictatorship.[263] In debating and passing the bill, congress based the decision to create such commission on evidence about the participation and collaboration of domestic and multinational companies with the dictatorship, and in response to the claim that they had benefited directly from military action. The aim of the commission is not to 'let the events that occurred as a result of a coup to be diluted over time'.[264] As the bill creating the commission concludes, 'investigating and elaborating on the economic and financial involvement with the dictatorship will help the process of rebuilding the nation'.[265] Business leaders from the Argentine Industrial Union and the Argentine Association of Businesses, however, oppose the measure, saying the initiative was 'aimed at stigmatizing business leaders'.[266] The new government under Mauricio Macri is debating whether to move forward with the commission arguing that it does not want to be 'used as a tool against business'.[267]

A group of UN-mandated holders of special procedures, including Pablo de Greiff and Juan Pablo Bohoslavsky, endorsed the draft law citing the 'need to respect human rights and the rule of law applies to both public and private actors'.[268] They added,

> The creation of such a commission represents a great opportunity to find out the truth and promote accountability for past violations committed with the complicity or active participation of the business sector…It is time to ensure accountability for corporations and transnational companies directly or indirectly responsible for violations of human rights.[269]

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[262] Cámara de Diputados de la Nación, *Ley de creación de la Comision Bicameral de la Verdad, la Memoria, la Justicia, la Reparación y el Fortalecimiento de las Instituciones de la Democracia*, Law no. 27217, 3 December 2015.
[263] Ibid., Arts 3, 6.
[264] Ibid.
[265] Ibid.
[266] Buenos Aires Herald, 'Case of business complicity stalled in court' 24 March 2016.
[267] Ibid.
[268] UN OHCRH, 'Argentina dictatorship: UN experts back creation of commission on role business people played', 10 November 2015.
[269] Ibid.

The Commission had been originally suggested in the book by Verbitsky and Bohoslavsky, *Cuentas Pendientes,* which argued that the dictatorship could not have existed or carried out the repression without corporations' direct and indirect involvement, and advocated the establishment of a truth commission to specifically investigate corporate and financial support of the dictatorship.[270] In their work the authors argued that clarifying the role played by economic actors, and in particular investigating the financial contributions to the *junta* was essential to understanding the dictatorship.[271] Evidence about complicity and collusion with the *junta* can also contribute to the on-going trials described in Chapter III, and toward the overall understanding of the patterns of the 'system crimes'[272] committed, and the structural nature of the *junta*'s operations as a collective movement, in a similar way that the South African TRC contributed to the understanding of apartheid as a 'system'.

Conclusion

Truth-seeking initiatives established after the governance transitions in South Africa, Liberia, East Timor, Sierra Leone, and Brazil have increasingly sought to use their mandate to scrutinise the role and responsibility of corporations and other economic actors in facilitating gross violations by oppressive regimes. In their final reports, each of these commissions has included recommendations for the government that specifically sought to offer redress for victims of corporate abuses. The hearings they conducted have evidenced corporate responsibility for rights violations, defined the procedural and substantive dimension of the right to reparations for victims of corporate abuses, introduced innovative recommendations that business entities should contribute to such reparations, and recommended the recovery of assets to assist in the payment of reparations.[273] Four positive aspects distinguish truth processes with such mandate.

First, examining the role that corporations played in past abuses allows for the establishment of a more complete and holistic narrative of the violations that occurred, and facilitates a more thorough comprehension of the dynamics that contributed to the conflict or repression. The purpose of any truth-seeking initiative is to document and explain pervasive patterns of abuse,

[270] Bohoslavsky and Verbitsky (n 169).
[271] Ibid.
[272] Bohoslavsky and Opgenhaffen (n 44), 197.
[273] Darcy (n 4), 10, 54.

and to address the root causes of conflict in order to paint a broader portrait of culpability.[274] By examining the role of corporations in past abuses, truth commissions have been able to narrate a story about the atrocities that took place that is more representative of the multi-causal origins of the conflict or repression.[275] For example, despite the limitations of the process analysed above, the South Africa TRC succeeded in creating an historical record of the complex role played by businesses during, and sometimes in conjunction with, the apartheid regime. Truth commissions in Liberia, East Timor and Sierra Leone and UN-mandated investigations in the DRC have also helped to understand the specific role of natural resources in the maintenance of authoritarian regimes and the facilitation of armed conflicts.[276]

A second contribution of truth commissions has been the attempt and ability to counter corporate impunity. Truth-seeking initiatives often do not have judicial powers, but their findings can nonetheless serve to initiate subsequent judicial proceedings. TRCs in Liberia and East Timor for example, have named specific companies, and these often provide the only official account of the nature and scale of corporate abuses. By reflecting on the relationship between these violations and the responsibilities of companies, they provide a more comprehensive account of corporate actions, including data on the wealth they amassed, the resources available for reparations and the kind of punishments or measures of forgiveness that society should impose or can afford. Once the truth is established in this manner other outcomes are also left open to possibility. Hayner explains that a stated intention of most truth commissions has been to contribute to justice in the courts; many have forwarded their files to the relevant authorities and have recommended prosecution.[277] For example, in its final report the South Africa's TRC submitted that there were legal grounds for instituting claims for reparations against banks and other corporations. As discussed in Chapter III, dissatisfaction on the part of apartheid victims with the compensation awarded by the South African government, and the meagre contribution of companies, resulted in the *Apartheid Reparations* litigation filed in the United States.[278] The lawsuit was seen as a logical continuation to the

[274] Hayner (n 4), 1001.
[275] Carranza (n 7), 319-21; I Robinson, 'Truth Commissions and Anti-Corruption: Towards a Complementary Framework?' (2015) 9 Intl J Trans Just 33.
[276] Harwell and Le Billon (n 226), 283.
[277] Hayner (n 4), 90.
[278] M Swart, 'The Khulumani Litigation: Complementing the Work of the South African Truth And Reconciliation Commission' (2011) 16 Tilburg L Rev 30, 31; Barnard-Naudé (n 13), 201, 214; I Gubbay, 'Towards Making Blood Money Visible: Lessons Drawn from the Apartheid Litigation' in Bohoslavsky and

incomplete work of the TRC in holding corporations accountable.[279] Also of note, as a result of the Brazil commission's findings, some of the workers named in the documents have indicated they may pursue civil lawsuits or other legal action, ask reparations for lost wages, or seek an apology.[280]

A third distinct contribution of truth commissions lies in recognizing the links between the behaviour of corporations and human rights violations, which may have a potential deterrent effect on future corporate behaviour in countries that continue to suffer oppressive regimes. As a corollary it has to be emphasized that any failures to address the economic factors that contribute to a repressive government constitute a dangerous historical blindness.[281] The risk is that same factors will emerge again, resulting in the recurrence of violations. Arguably a fuller historical record, one that includes corporate involvement, can help ensuring a country in transition will not be left in a position where it could repeat past violations. Moreover, in line with Nelson Camilo Sanchez, who argues that truth commissions should pursue 'transformative reparations' that address the circumstances of affected communities, truth commissions can recommend non-monetary measures for corporations - for instance, an improving in working conditions.[282] Finally, if it is determined that corporations should be held accountable for human rights violations that occurred during an oppressive regime, this would likely provide an additional source of funding for reparations to victims and their families.

Truth commissions' recommendations for corporations to finance reparations programmes while simultaneously addressing corporate accountability have been, however, largely ignored by the governments, mostly for fear of falling foul of investors at a time of transition. Truth commissions usually only have the power to recommend reparations; they do not have the power to directly compel the payment of them, and the task of making demands for and collecting reparations usually falls to government.[283] Accordingly, governments have rarely implemented TRCs' recommendations concerning reparations, and the contributions of

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Letnar Černič (n 193), 337, 344; E Daly, 'Reparations in South Africa: A Cautionary Tale' 33 (2003) U Mem L Rev 367, 383-87.

[279] Abrahams, 'The TRC's Unfinished Business' (n 186), 34, 35.

[280] Reuters, 'The "Black list": Documents suggest foreign automakers aided Brazil's dictators' 5 August 2014.

[281] Bohoslavsky and Opgenhaffen (n 44), 197-201.

[282] Sanchez (n 198), 119.

[283] Darcy (n 4), 43-46; Hayner (n 4), 251; T Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2002) 23 Mich J Intl L 977, 1002.

businesses accused of collusion in oppression has been far less than the commissions have proposed.[284] In the end, none of the recommendations for prosecution or reparation concerning corporate involvement in abuses recommended by the TRCs in South Africa, Liberia, and East Timor was followed by the respective governments. While there are no normative obstacles to expanding the focus of truth seeking initiatives to include corporate actors, there remain economic, practical and political reasons for this struggle. As a consequence despite their best efforts in this direction, truth commissions have struggled to secure accountability and affective remedies.[285]

Truth commissions typically face short deadlines, tight budgets, and low institutional capacity and, as a result, they may have to give priority to the most serious violations, which may not involve corporate actors.[286] Moreover, addressing questions of corporate complicity may require interdisciplinary multi-faceted investigations and triangulation information from the state, financial institutions, and corporations, which demands not only specialized personnel, but also a robust infrastructure that truth commissions do not usually have. Even if a truth commission was properly equipped and staffed, powerful interest groups could politically block this kind of investigation. A typical parliamentary negotiation for the establishment of a truth commission involves both victims and members of the former regime. Adding the interests of businesspeople and corporations to the mix could make it harder to approve a truth commission, or to make it work after the approval.[287] This type of situation, for example, may block the path of the Argentina's commission on economic complicity. Those who may have benefited from corporate operations and remain influential in governmental and commercial interests in contemporary Argentina may effectively obstruct commission operations if they believe this would endanger their economic interests.[288] As described above, the South Africa, Liberia, and the East Timor's TRCs all attributed responsibility to corporations and recommended for businesses to pay reparations, but the respective governments lacked the political will to implement the commissions' proposals.[289]

[284] Darcy (n 4), 55; Sandoval and Surfleet (n 79), 100.
[285] Koska (n 9), 44; Robinson (n 275).
[286] Harwell and Le Billon (n 226), 299-305.
[287] Bohoslavsky and Torelly (n 257), 257.
[288] Sriram (n 165).
[289] Sandoval and Surfleet (n 79).

Remedy for corporate human rights violations in transitional justice contexts can be mandated by international and national judicial processes or recommended by truth commissions. This chapter and the previous have discussed the limitations of such processes due to a number of normative, political, and economic reasons. Remedies can however also be achieved through reparations programmes established at the administrative level, an issue which the next chapter examines in detail.

V. ADMINISTRATIVE REPARATION PROGRAMMES

Introduction

The previous chapters have analysed two types of remedies available to victims of corporate abuses in transitional justice contexts: judicial processes - at the international (Chapter I), regional (Chapter II), and domestic levels (Chapter III) – and truth-seeking initiatives (Chapter IV). This chapter discusses another form of remedy, administrative reparations programmes – i.e. reparations programmes created by legislation for whole classes of victims rather than in response to individual cases.

While reparations programmes often target the most serious forms of civil and political rights violations, some reparations programmes have paid attention to a broader band of rights violations.[1] In Brazil, for example, reparations were paid to workers that had to abandon their jobs due to political persecution, especially after the 1979 Amnesty law when the labour unions joined the struggle against the dictatorship.[2] The Argentinian government passed a number of laws and decrees to provide reparations for victims of human rights abuses, including payment of compensation for lost labour time.[3] In most cases, however, the attention has centred primarily or exclusively on making only the state accountable.[4] The responsibility of corporations to provide reparations has not been given adequate consideration.[5] In theory, corporations could provide any of the five recognised forms of reparations (restitution,

[1] An early effort to link impunity and reparation for economic, social and cultural rights, albeit not explicitly in a transitional justice context, was UN Sub-Commission on the Promotion and Protection of Human Rights, Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural rights), UN. Doc. E/CN.4/Sub.2/1997/8, 1997. See also, L Magarrell, 'Reparations for Massive or Widespread Human Rights Violations: Sorting out Claims for Reparations and the Struggle for Social Justice' (2003) 22 Windsor YB Access Just 91-94; R Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press 2002); Z Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 Intl J Trans Just 266, 285.

[2] JP Bohoslavsky and MD Torelly, 'Financial Complicity: The Brazilian Dictatorship Under the "Macroscope" in DN Sharp (ed.), *Justice and Economic Violence in Transition* (Springer Science Business Media 2014), 256; I Cano and P Galvão Ferreira, 'The Reparations Program in Brazil' in P de Greiff (ed.), *The Handbook of Reparations* (OUP 2006), 102; Magarrell (n 1), 91.

[3] JP Bohoslavsky and V Opgenhaffen, 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship' (2010) 23 Harvard Human Rights J 157, 197-201.

[4] C Sandoval and G Surfleet, 'Corporations and Redress in Transitional Justice Processes' in S Michalowski, *Corporate Accountability in the Context of Transitional Justice* (Routledge 2014), 93, 96.

[5] Ibid., 93.

compensation, rehabilitation, satisfaction, and guarantees of non-repetition[6]) in isolation or in combination. In practice, in the case of corporations there is a tendency to prefer compensation to other forms of reparations.[7] In international law the preferred form of reparation both in state practice and in the theory is restitution; only when this is not possible may other forms of reparations be awarded.[8] In 1928, the Permanent Court of International Justice ruled in the *Chorzów Factory* case that restitution was the preferred remedy for correcting illegal governmental takings of property.[9]

Restitution refers to measures that restore the victim to the original situation before the violations occurred, including the return of property and land. The concept of restitution has long been accepted as an important judicial remedy in international law. The particular remedy of restitution stems from the broader right to an effective remedy for violations of human rights.[10] International law approaches restitution generally through the lens of infringements of law due to what are defined as wrongful acts or omissions attributable to states through the application of the law of state responsibility.[11] Restitution is also a key element of the remedial measures envisaged under international criminal law.[12] While corporations do not have a specific obligation to provide restitution under international law, they may be forced to provide such restitution under the national law of a country. This is because victims of human rights violations, including corporate related abuses, have an enforceable right to have the violation remedied, repaired and reversed.[13]

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[6] UN General Assembly, Resolution 60/147 of 16 December 2005, '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' [Basic Principles], Arts 19-23.
[7] Sandoval and Surfleet (n 4), 109.
[8] Permanent Court of Justice, *Chórzow Factory (Indemnity)* case (*Germany v. Poland*), 1928 PCIJ (ser. A) No. 17, Judgment of 13 September 1928), 47. See also, FL Kirgis, 'Restitution as a Remedy in US Courts for Violations of International Law' (2001) 95(2) AJIL 343.
[9] *Chórzow Factory* (n 8), 47.
[10] See, Universal Declaration of Human Rights (UDHR), Art 8; International Covenant on Civil and Political Rights (CCPR), Art 2; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Art 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Art 11; Convention on the Rights of the Child (CRC), Art 39.
[11] For example, a legal opinion of the Inter-American Juridical Committee has asserted that restitution is required for any violation of an international obligation: Inter-American Juridical Committee, Legal Opinion on the Decision of the Supreme Court of the United States of America, OAS Doc. CJI/RES.II-15/92, para. 10 (1992).
[12] eg, Rome Statute, UN Doc. A/CONF.183/9 (1998), 17 July 1998, Art 75(1); Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (11 February 1994), Art 105.
[13] UNHCR, Inter-Office Memorandum No. 104/2001, 28 November 2001, Field Office Memorandum No. 101/2001, 28 November 2001.

It is on these foundations that the subsequent concepts on land restitution to those deprived of it during period of conflict or repression, have been built.[14] The *Basic Principles on the Right to Remedy and Reparations* state that restitution includes 'return to one's place of residence' and 'return of property' and 'should, whenever possible, restore the victim to the original situation' before the violations occurred.[15] These points were further refined in the *UN Principles on Housing and Property Restitution* (the Pinheiro Principles).[16] They constitute evidence for the preference towards restitution as an appropriate and justifiable remedy for violations of international law, in particular those violations involving the illegal confiscation of housing, property, and land.[17] As such, administrative reparations programmes can in certain circumstances provide the restitution of property and land from corporations.[18] This chapter looks at administrative reparation programmes dealing with a particular type of reparation, land restitution, which can include the restitution of land taken for economic reasons during an armed conflict or time of repression.

There are a number of reasons for the focus on land restitution: land acquisition is often a key driver of conflict; land confiscation, forced evictions and population displacement are common during conflict; land disputes are a key aspect that countries in transition need to address; land is, in most cases, the most important asset that victims seek back; corporations are often involved in land confiscation either directly or in complicity with the state; land rights abuses are some of the most widespread corporate human rights abuses; and innovative reparation programmes have tried to deal with victims' grievance in this area. This chapter focuses on efforts to return land that was taken for economic projects in transitional countries in three different regions (Colombia, Myanmar, and South Africa). The analysis presented here is intended to show that, despite challenges, innovative reparations programmes involving the responsibilities of business have been implemented and that despite difficulties,

[14] UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc. E/CN.4/Sub.2/2005/17 (2005) [Pinheiro principles]. The right of return can be found in Article 13(2) of the UDHR and Article 12(4) of the ICCPR. See also, D Fitzpatrick and A Fishman, 'Land Policy and Transitional Justice after Armed Conflicts' in Sharp (n 2), 263, 274; RC Williams, 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice' (2005) 37 NYU J Intl L Policy 448; G Paglione, 'Individual Property Restitution: From Deng to Pinheiro -and the Challenges Ahead' (2008) 20 Intl J Refugee L 393; E Rosand, 'The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?' (1998) 19 Michigan J Intl L 1128.
[15] Basic Principles (n 6), Art 18.
[16] Pinheiro principles (n 14).
[17] Fitzpatrick and Fishman (n 4), 276.
[18] J Goebertus, 'Palma de Aceite y Desplazamiento Forzado en la Zona Bananera' (2008) 67 Colombia Internacional 152.

this remains one of the most interesting avenues for remedy.

V.1 Land Restitution Programmes

The question of land is a complex and deeply interconnected one. Its realisation remains challenging, and among the most sensitive topics in most transitional countries. Land access is often a key cause of conflict, and the conflict then exacerbates the problem, including as a result of population displacement and 'land grabbing' by political elites, with corporations often benefitting directly and indirectly from land seizures. [19] During the conflict in Colombia, for example, land titles and property rights were transferred directly from the population to corporations.[20] During the conflict in Myanmar the military government as well as state-owned and private companies confiscated millions of acres of land from hundreds of thousands of people.[21] The next sections compare experiences in Colombia, Myanmar, and South Africa, which suggest that the restitution of land unlawfully taken by companies during a time of conflict or repression offers an important form of corporate accountability and redress to victims, but it is met by a number of normative and practical challenges, especially in post-conflict countries where land tenure is generally insecure and customary rights are not legally recognised.

Colombia's Victims and Land Restitution Law

In Colombia, the issue of land has been a central part of the armed conflict since it started in the 1960s. Historically a highly unequal society, the concentration of land in the hands of a few has increased dramatically in the course of the conflict.[22] During the armed conflict, warring factions forcefully displaced almost six million people from large tracts of land in

[19] C Huggins, 'Truth, Justice, Reconciliation, and… Land Tenure Reform?' (2009) Oxford Transitional Justice Research Working Paper Series, 3 and 'Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform and Development' in P de Greiff and R Duthie, *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009) 332, 333; Fitzpatrick and Fishman (n 4), 263-67; R Duthie, 'Transitional Justice and Displacement' (2011) 5(2) Intl J Trans Just 245; B Atuahene, 'Property Rights and the Demands of Transformation' (2010) Michigan J Intl L 31 and 'Property and Transitional Justice' (2010) UCLA L Rev Discourse 58.

[20] T Van Ho, 'Is it Already Too Late for Colombia's Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives' (2016) 5(1) Intl Human Rights L Rev 60.

[21] I Pietropaoli, 'Corporate Accountability and Transitional Justice in Myanmar' (7 March 2016) JusticeInfo; Amnesty International, *Open for Business? Corporate Crime and Abuses at Myanmar's Copper Mine* (AI 10 February 2015); Global Witness, *Guns, Cronies and Crops* (GW 26 March 2015); FIDH, *Land of Sorrow: Human Rights Violations at Mandalay's Myotha Industrial Park* (FIDH 27 September 2107).

[22] KA O Lid and J García-Godos, 'Land Restitution in the Colombian Transitional Justice Process' (2010) 28 Nordic J Hum Rts 262, 263.

mainly rural areas, which were taken over by guerrillas, paramilitaries, drug traffickers, and by companies.[23] The forced displacement of populations alongside subsequent corporate occupation was a common occurrence.[24] There are serious allegations and some compelling evidence to suggest that corporations have been complicit in the forced displacements in two ways: first, by directly paying for militants to displace people in order to gain access to land,[25] and secondly, by purchasing land from armed actors after a displacement, without any attempt to compensate those who were originally displaced from it.[26] This is a part of what is often referred to as the phenomenon of the 'para-economy' in Colombia - the informal economic network that has benefitted directly in their business from political and paramilitary violence.[27] Mining and agriculture companies, in particular, have been accused to rely on paramilitary groups to help expand and secure their operations.[28] Indeed, population displacement is largely concentrated in areas where mining and agro-industries activities are widespread.[29] The involvement of palm oil companies in the Colombian conflict provides a good example of the grey area between legality and illegality in which companies exploit conflict to benefit economically.[30] In the Urubá and other regions in Colombia, palm oil companies that legally bought land from which communities and individuals have been displaced by conflict continue to have direct links with the paramilitaries.[31] Several of these companies are owned by paramilitaries operating under aliases, which acts as a further economic drain in that the economic activity generated is not fed back into the formal economy, and is instead used to further undermine the security climate of the state.[32]

The Colombian government has embarked on an innovative restitution and reparations

[23] Ibid., 272, 282-83; N Summers, 'Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?' (2012) 25(1) Harvard Human Rights J 219, 222; AM Ibañez and CE Velez, 'Civil Conflict and Forced Migration: Micro Determinants and Welfare Losses of Displacement in Colombia' (2008) 36 World Development 659, 661.
[24] F Thomson, 'The Agrarian Question and Violence in Colombia: Conflict and Development' (2011) 11(3) J Agrarian Change 321, 347.
[25] C Espinosa, 'The Constitutional Protection of IDPs in Colombia,' in RA Rivadeneira (ed.), *Judicial Protection of Internally Displaced Persons: The Colombian Experience* (Brookings Institution 2009), 3.
[26] Thomson (n 24), 347.
[27] VL Franco and JD Restrepo, 'Empresarios Palmeros, Poderes de Facto y Despojo de Tierras en el Bajo Atrato' in M Romero Vidal (ed.), *La Economía de los Paramilitares* (Debate 2011), 269, 317.
[28] Ibid., 280.
[29] Summers (n 23), 222; Ibanez and Velez (n 23), 661; AM Ibañez and JC Muñoz, 'The Persistence of Land Concentration in Colombia: What Happened Between 2000 and 2010?' in M Bergsmo and others (eds.), *Distributive Justice n Transitions* (FICHL 2010), 279, 306-07.
[30] NC Sanchez, 'Corporate Accountability, Reparations and Distributive Justice in Post Conflict Societies' in Michalowski (n 4), 114, 118.
[31] Goebertus (n 18).
[32] Franco and Restrepo (n 27), 286.

programme aimed at 'integral reparations', under which some corporations may be forced to turn over land and titles to land that were obtained during the conflict.[33] Transitional justice processes started in Colombia in 2005 with the approval of the *Justice and Peace Law*.[34] The *Victims and Land Restitution Law* (Victims' Law), passed in 2011, is intended, in part, to redress the widespread forced displacements stemming from the conflict.[35] Envisaged as a component of the reparations programme, restitution of land is considered by the government to partly contribute to a sustainable solution of the land issue, and by extension, of the Colombian armed conflict.[36] The Victims' Law aims to facilitate truth, justice, and integral reparations for victims, with a 'guarantee of no repetition'.[37] The law defines as 'victims' people, or their family members, who suffered grave violations of human rights or of international humanitarian law in the context of the internal armed conflict from 1 January 1985.[38] It states that the objective of reparations is to contribute to repositioning (*recuperar*) victims as citizens in the full exercise of their rights and duties.[39] Most significantly, the Victim's Law declares a right of restitution for those who have been dispossessed of their land or who have been forced to abandon it.[40]

The heart of the law lies in the scheme for land restitution.[41] The Victims' Law establishes a clear, context-specific, and extensive right to land restitution.[42] Because the problem of forced displacement is widespread, the law was specifically designed to provide an easy and accessible remedy for victims.[43] The legal and actual return of the land that was dispossessed remains a key goal to the attempt to gain transitional justice; only where it is not possible to meet this goal (for example, because of continued lack of security), then equivalent land, or

[33] *Ley de Víctimas y Restitución de Tierras* (Victims and Land Restitution Law), no 1448 (10 June 2011) [Victims Law]. See also, Van Ho (n 20), 62; O Lid and García-Godos (n 22), 277, 287.
[34] Justice and Peace Law, no 975 (2005). See also, KA O Lid and J García-Godos, 'Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia (2010) 42(3) J Latin American Studies 487.
[35] Victims Law (n 33). See also, Summers (n 23), 220; DL Attanasio and NC Sánchez, 'Return within the Bounds of the Pinheiro Principles: The Colombian Land Restitution Experience' (2012) 11 Washington Univ Global Studies L Rev 1, 2.
[36] O Lid and García-Godos (n 22), 265
[37] Victims Law (n 33), Art 1. See also, Summers (n 23), 225; O Lid and García-Godos, 'Transitional Justice and Victims' Rights before the End of a Conflict' (n 34).
[38] Victims Law (n 33), Art 3.
[39] Ibid.
[40] Ibid., Arts 71-72.
[41] Ibid. It applies to land lost after 1 January 1991. See also, P Martínez Cortés, 'Ley De Víctimas y Restitución de Tierras en Colombia en Contexto' (2003) FDCL and Transnational Institute.
[42] Victims Law (n 33), Art 75.
[43] Ibid., Art 77(3)(4). See also, Summers (n 23), 223, 227-28; Van Ho (n 20), 70.

compensation for the loss, is to be provided.[44] Importantly, the law shifts legal presumptions and the burden of proof regarding land ownership distinctly in favour of victims.[45] As Roht-Arriaza points out, one of the most interesting aspects of the law is the way it establishes the necessary causal link to dispossession.[46] Rather than making the claimant prove that they fit within the definition, the law reverses the burden of proof with the use of presumptions.[47]

The Law includes a presumption that land transfers were illegal if they were entered into as a business or sales contract between the victim and any individual 'convicted of membership, collaboration or financing of armed groups'.[48] It also establishes a presumption of illegality if the transfer was the result of a business transaction stipulated at less than half of its value, or where the transaction was made in areas of widespread violence, massive displacement, or grave violations of human rights, in areas where land became increasingly concentrated or where crop production significantly changed, or where the leadership of the contracting community business or farming cooperatives changed after the displacement.[49] Anyone who possesses land, which is ordered to be restituted through this process, 'will have [his] possession declared void as if it never occurred'.[50] If a subsequent owner has purchased the land in 'good faith', he can oppose the restitution process and receive compensation for his loss.[51] As Nicole Summers notes, '[t]he inversion of the burden of proof is widely considered a major achievement of the Victims' Law and one that will significantly advance the right to restitution'.[52]

The law also adopts a series of measures to address corporate involvement in displacement.[53] It attempts to regulate corporate purchases of land and also to hold businesses accountable for contributing to the displacement.[54] First, the Victims' Law stipulates that corporations may be held financially liable for their involvement in the conflict.[55] Judges in individual reparations

[44] Victims Law (n 33), Art 72.
[45] Ibid., Arts 77-78.
[46] N Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in Sharp (n 2), 109, 129.
[47] Victims Law (n 33), Art 78.
[48] Ibid., Art 77(1). See also, Attanasio and Sánchez (n 35), 24.
[49] Victims Law (n 33), Art 77.
[50] Ibid., Art 99. See also, Summers (n 23), 230.
[51] Attanasio and Sánchez (n 35), 24.
[52] Summers (n 23), 229.
[53] Victims Law (n 33), Arts 98, 178.
[54] N Summers, 'Recent Developments: Colombia's Victims' law: Transitional Justice in a Time of Violent Conflict?', (2012) 25(1) *Harvard Human Rights Journal at 232*
[55] Summers (n 23), 232.

cases can require businesses, when found responsible for 'contributing to victimization', to make payments to the Victims' Reparations Fund.[56] The *Justice and Peace Law* established the fund in 2005 as a financing mechanism for victims' reparations, including restitution and civil damages.[57] Until the Victims' Law was passed, judges were only allowed to mandate payments from paramilitary groups.[58] Under the new law, judges may declare that companies bear partial responsibility for displacement or other damages and, accordingly, may impose financial penalties on them.[59]

Second, the law bans all sales of land that has been restituted for the two-year period post-restitution, and requires judicial authorization of all contracts for the use of this land.[60] For corporations who acquired such land or acquired licenses to use the land, the law may lead to these purchases or licenses being voided, even if courts previously recognized that they entailed land rights.[61] The provision applies specifically to businesses that wish to continue large agro-industrial projects on previously purchased or leased land. To be considered for authorization, companies wishing to re-contract must prove that they acted in good faith when creating the original contract.[62] If corporations fail to prove good faith, the agro-industrial project will be turned over to the government, and profits will be put towards local victims' reparations programmes.[63]

One of the most controversial provisions of the law concerns such areas where the dispossessed lands have been turned into agribusiness projects. While displacements due to military considerations are relatively easily reversed (once military operations have ended one could expect the civilian population to return to their place of origin), large-scale projects make irreparable changes to the areas where they are developed.[64] Transformation of the use of land, from subsistence farming to vast monocultures makes the reversal practically impossible. If these lands are to provide acceptable social-economic conditions for the

[56] Ibid.
[57] Justice and Peace Law (n 34), Art 54.
[58] Ibid.
[59] Victims Law (n 33), Art 177.
[60] Ibid., Arts 99, 101.
[61] Van Ho (n 20), 70.
[62] Victims Law (n 33), Arts 99, 207. See also, MJ Guembe and H Olea, 'No Justice, No Peace: Discussion of a Legal Framework Regarding the Demobilization of Non-State Armed Groups' in N Roht-Arriaza and J Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press 2006), 120.
[63] Victims Law (n 33).
[64] O Lid and García-Godos (n 22), 268.

displaced peoples of Colombia a mere restitution may not be sufficient.[65] Some stakeholders support a restitution policy that focuses on correcting the illegal dispossession and clarifying land titles and individual rights to property, which would serve to boost the land market and allow for rural development policies that modernize agricultural production, fundamentally based on large, corporate ownership.[66] Arguably, a better approach is one of a restitution policy that meets the requirements of recognition and redistribution, advancing the interest of peasant, indigenous, and Afro-Colombian communities.[67]

Some scholars propose the notion of 'transformative reparations' as a more adequate perspective from which to conceive reparations to victims of the Colombian armed conflict, and particularly to victims of land dispossession.[68] For example, Nelson Camilo Sánchez suggests a strategy to restore illegally accumulated assets and to redistribute wealth that private actors accumulated during the conflict in Colombia.[69] This strategy is part of a theoretical elaboration of the concept of transformative reparations in an effort to combine the dominant concept of reparations backed on corrective justice with the concept of distributive justice.[70] This model differentiates the degree of responsibility of the actor that obtained the wealth into three levels: high, medium and low.[71]

The 'high responsibility' category refers to where an actor has direct responsibility for violations perpetrated: these are essentially a category that focuses on companies that directly committed illegal acts to obtain economic benefits or financed armed groups to obtain commercial advantages. For example, *Drummond* allegedly paid paramilitary group to violently resolve labour disputes.[72] Direct responsibility cases can be dealt with through mechanisms of corrective justice, namely criminal and civil judgments - primarily using

[65] MP Saffon and R Uprimny-Yepes, 'Reparations for Land Dispossession and Distributive Justice in Colombia', Selected Briefs from the Seminar 'Land Reform and Distributive Justice in the Settlement of Internal Armed Conflicts', Bogotá (5-6 June 2009); Roht-Arriaza (n 46), 129, 131; R Uprimny-Yepes and NC Sánchez, 'Los dilemas de la restitución de tierras en Colombia' (2010) 12(2) Revista Estudios Socio-Jurídicos 305, 325; O Lid and García-Godos (n 22), 268
[66] Uprimny-Yepes and Sánchez (n 65).
[67] Ibid.
[68] Ibid.
[69] Sanchez (n 30), 119.
[70] NC Sanchez and R Uprimny-Yepes, 'Propuestas para una restitución de tierras transformadora' in C Díaz (ed.), *Tareas Pendientes:Propuestas para la formulación de políticas públicas de reparación en Colombia* (ICTJ 2010); C Díaz Gómez, NC Sánchez, R Uprimny-Yepes, *Reparar en Colombia: los dilemas en contextos de conflicto, pobreza y exclusión* (ICTJ and DeJusticia 2010).
[71] Sanchez (n 30), 119.
[72] See Chapter III.2.

existing tort mechanisms on the basis of the principle of integral reparation, which requires that victims receive full reparations or complete restitution.[73] As discussed, the Victims' Law stipulates that money used to compensate victims should partially come from business that have financed paramilitaries relative to the extent to which the conflict was exacerbated by the business financial support.[74]

The category labelled as 'medium responsibility' refers to those with indirect responsibility: companies that conducted business with the knowledge that the conflict helped its commercial success, but who did not directly participate or support violations. For example, as discussed in Chapter III, *Chiquita* while did not directly commit violent actions had a clear supportive link with paramilitary groups.[75] Indirect responsibility cases are more complex to deal with since they have to address the responsibility of companies that are known to have acted illegally, but against which the available evidence is insufficient for judicial proceedings. Sanchez argues that it is possible to design a mechanism applying both the principles of corrective and distributive justice.[76] During the conflict, cultivable land was transferred through the forced displacement of people, and companies in various sectors acquired much of such land at derisory prices.[77] A way to reverse such a large-scale dispossession could be to introduce a flexible evidence mechanism that allows land restitution without requiring victims to prove intent.[78] For example, as discussed, the Victims' Law establishes a judicial presumption that people that transferred property in an area of generalised violence did so because of the violence – they are not required to prove the nature of this violence or threat of violence.[79] This approach allows the reversing or annulling of certain legal transaction based on the idea that all land in prescribed areas affected by the violence ought to be considered abandoned land (*res derelicta*) because of the violence, and as a corollary this ferments the assumption that companies who acquired such land participated in bad faith in such displacement.

[73] Ibid., 123.
[74] Victims Law (n 33), Art 117(e)(f). See also, Martínez Cortés (n 41).
[75] See Chapter III.2.
[76] Sanchez (n 30), 125.
[77] Comisión de Seguimento, Cuantificación y Valoración de las Tierra y los Bienes Abanodnados (2011).
[78] Sanchez (n 30), 126.
[79] Victims Law (n 33), Arts 77-78.

Finally, the category of 'low responsibility' refers to cases in which the company developed a successful business in Colombia, but where there was no causal nexus between the company's profits and the human rights violations that occurred.[80] The cases of many Colombian banks may exemplify low degrees of responsibility. In such cases, where there is insufficient evidence to establish any degree of responsibility, Sanchez argues that the ethical and legal justifications for requiring those companies to contribute to the transitional justice programme is not corrective justice, but distributive justice based on the principle of solidarity with public burdens.[81] Distributive justice provides a duty on society to assist individual members in proportion to the individual needs, contribution and responsibility, the resources available to the society, and the society's responsibility to the common good.[82] For example, banks could be required to forgive loans of displaced peoples, or provide debt relief.[83]

To implement the Victims Law, however, the state would need to prevent companies from accessing, using, or benefiting from the restituted land. The resulting financial impact on the corporation raises concerns under international investment law.[84] As Tara Van Ho points out, 'the potential effect [of the restitution] on multinational corporations raises the potential that international investment law's prohibition on expropriation without compensation could be used to stymie the implementation of the Victims' Law'.[85]

Colombia is party to 18 investment treaties or trade agreements with investment protections.[86] Companies are protected by these treaties if they have an 'investment' - Colombia's investment treaties refer to 'any asset' in the country.[87] This means that both the property to be restituted under the Victims' Law and the licenses granted to companies are considered 'investments' under Colombia's international investment law commitments.[88] As discussed, the Victims' Law requires the state to nullify transfers of property in certain cases. Despite the legitimate public purpose inherent in this law, the transfer of property may give rise to a

[80] Sanchez (n 30), 122.
[81] Ibid., 127.
[82] KT Jackson, 'Global Distributive Justice and the Corporate Duty to Aid' (1993) 12(7) J Business Ethics 547.
[83] Sanchez (n 30), 129.
[84] Van Ho (n 20), 71.
[85] Ibid., 62.
[86] UN Conference on Trade and Development (UNCTAD), Investment Policy Hub, Colombia.
[87] See, eg, Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the People's Republic of China (2013), entered into force 2013; Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the Republic of India (10 November 2009), entered into force 2013.
[88] Van Ho (n 20), 72.

violation of international investment law's prohibition on expropriation, Van Ho argues.[89] Most investment treaties provide foreign investors with a right to disregard domestic judicial processes and seek immediate protection before *ad hoc* arbitral panels.[90] As a result, the threat of international investment law complaints may force Colombia to either opt out of applying the law to foreign corporations, or to pay those corporations millions for violating investment law protections.[91] States like Colombia, facing potentially widespread claims, may choose to limit transitional justice initiatives that impact foreign investors, or to exempt foreign investors from the impact of those initiatives, despite the negative impact this would have on home-grown Colombian capital and investment. This can exacerbate tensions within a community as the exemption of foreign corporations from transitional justice's reach may be seen as rewarding corporations with benefits received through complicity in human rights violations, while punishing investments generated through savings and profit generation in Colombia.[92]

South Africa's Land Restitution Programme

During the colonial and apartheid-era in South Africa, a series of laws progressively dispossessed millions of people.[93] By 1990, only 13% of the land was reserved for occupation by black South Africans and all productive agricultural land was in the hands of white farmers.[94] The South Africa TRC called for some manner of restitution to take place. It proposed that 'consideration be given to the most appropriate ways in which to provide restitution for those who have suffered'.[95] When negotiations on the interim constitution got underway in 1993 the protection of property became one of the most contentious issues.[96] The National Party government, the last government under the apartheid system, supported by the business lobby, insisted that such protection be provided for, and initially resisted the

[89] Ibid., 74. See also, M Sornarajah, *The International Law on Foreign Investment* (CUP 2010), 364-66.
[90] UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review* (2005).
[91] Van Ho (n 20), 23, 73 80.
[92] Ibid., 81, 83.
[93] The Natives Land Act of 1913 prohibited black South Africans from owning or leasing land outside small designated areas, later known as 'homelands' or 'Bantustans'.
[94] R Hall, 'Reconciling the Past, Present, and Future: The Parameters and Practices of Land Restitution in South Africa' in C Walker and others (eds.), Land, Memory, *Reconstruction, and Justice: Perspectives on Land Claims in South Africa* (Ohio University Press, 2010), 18-19.
[95] Truth and Reconciliation Commission of South Africa, *Final Report* (1998), Vol I, Ch 4, 48.
[96] F du Bois, 'Reparations and the Forms of Justice, in F du Bois and A du Bois-Pedain (eds.), *Justice and Reconciliation in Post-Apartheid South Africa* (CUP 2008), 116, 128; S Terreblance, 'Dealing with Systemic Economic Injustice, in C Villa-Vicencio and W Verwoerd (eds.), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (University of Chicago Press 2000), 265, 267 J Simcock, 'Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission' (2011) 47 Stan J Intl L 239, 259-60; Hall (n 93).

inclusion of any provision authorising restitution.[97] A compromise was reached at the end of the negotiation which was reflected in Section 28 of the Interim Constitution, which provided for a right 'to acquire and hold rights in property' and a concomitant duty on the state to pay compensation in the event of expropriation.[98] In this way, contrary to the case of Colombia, the beneficiaries of the right to restitution were not given a right against the current owners to demand the return of land, but rather a right against the state.[99]

In 1994, the first post-apartheid ANC government passed the *Restitution of Land Act* to restore land rights of individuals, households, and communities who were dispossessed due to racial discriminatory policies that had been adopted since the *Natives' Land Act* passed in 1913.[100] Settling restitution claims, however, proved extremely complex and time consuming.[101] Early evidence indicated that most restored farms were not producing – possibly due to the time that had passed and that people often got alternative land over their original land. To avoid the land becoming unproductive, to 'maintain food supplies and… to ensure that the transition is as smooth as possible',[102] the government urged people to enter into 'strategic partnerships' with the former agribusiness landholders, where the communities were encouraged to lease the land back to the former owners in exchange for a share of the profits, without being able to live on or work the land as they did prior to dispossession.[103] In the end, only about 1.5 million of the 80 million hectares of 'white agricultural land' were reallocated, while $562 million were spent on buying alternative land, and a further $475 million was spent on cash compensation - all with public funds.[104] The ambitious goal to redistribute 30% of white-owned agricultural land (estimated to be 67% of the country) to black South Africans was not met.[105] One of the few studies of how the money was spent in South Africa found that the amount dispensed was

[97] du Bois (n 95), 129.
[98] Interim Constitution of South Africa, Sect 28; Constitution of South Africa Act, no 200 of 1993, Sect 8.
[99] du Bois (n 95), 129.
[100] Restitution of Lands Act, no 22 of 1994 as amended by Land Restitution and Reform Laws Amendment Act 63 of 1997, Sect 2(1). See also Walker and others (n 93), 1; Roht-Arriaza (n 46), 123; T Roux, 'Land Restitution and Reconciliation in South Africa' in du Bois and du Bois-Pedain (n 95), 23.
[101] Roht-Arriaza (n 46), 124-25; H Mostert, 'Change Through Jurisprudence: The Role of the Courts in Broadening the Scope of Restitution' in Walker and others (n 93), 64-74 Hall (n 93), 25.
[102] ANC, *Ready to Govern*, 1992, Sect E.1. See also, R Hall, 'Land Restitution in South Africa: Rights, Development, and the Restrained State' (2004) 38(3) Canadian J African Studies.
[103] B Derman, E Lahiff and E Sjaastad, 'Strategic Questions about Strategic Partners' in Walker and others (n 93), 306.
[104] Hall (n 93), 30.
[105] Roht-Arriaza (n 46), 126.

too small and was mostly used to pay off debts and meet immediate expenses.[106] As a consequence, despite the reconciliation process and its vaunted and celebrated goals, land ownership in South Africa today remains highly unbalanced and unequal.

Land Restitution Efforts in Myanmar

Since independence from the United Kingdom in 1948, Myanmar's military committed widespread and systematic human rights violations, including war crimes and crimes against humanity and engaged in the world's longest civil war with ethnic armed groups, still unresolved today.[107] The armed conflict is centred on ethnic groups' demands for autonomy, but is fuelled by competition over land and natural resources, which are primarily located in conflict-afflicted ethnic areas.[108] In 2011, Myanmar began its transition to peace and democracy, which culminated in the first democratic elections in 2015 and the victory of Nobel Peace Prize Laureate Aung San Suu Kyi's National League for Democracy (NLD) party.[109] These reforms resulted in Western governments' lifting of the economic sanctions that were put in place since the 1990s, and this oversaw an immediate and dramatic rise in foreign investment.[110] Since the reform process began, civil society organizations have increasingly called upon to provide redress for corporate human rights abuses, particularly in relation to land grabs and forced relocation.[111]

Land acquisition and confiscation and resultant forced displacement in Myanmar, both prior to and during the reform process, have been carried out for a number of reasons. These include military settlements and public infrastructure projects, as well as the establishment of agro-industrial plantations by private entities, large industrial development projects, special economic zones, and hotel zones. Studies indicate that national and multinational companies, often in collusion with the military and the government, were responsible of at least 20% of land confiscation cases.[112] For example, a report by Global Witness documented large areas of

[106] A Bohlin, 'A Price on the Past: Cash as Compensation in South African Land Restitution' (2004) 38(3) Canadian J African Studies 672.
[107] UN General Assembly, 'Situation of human rights in Myanmar' 22 September 2012 UN Doc A/76/383; Time, 'Is the World's Longest-running Civil War About the End?', 6 November 2013; Pietropaoli (n 21).
[108] Pietropaoli (n 21).
[109] BBC, 'Myanmar's 2015 landmark elections explained' 3 December 2015.
[110] Irrawaddy, 'Foreign Investment Soars to Record $8B in 2014-15' 9 April 2015.
[111] Amnesty International (n 21); Global Witness (n 21); FIDH (n 21); Land in Our Hands Network (n 21).
[112] Land in Our Hands Network, *Destroying People's Lives: The Impact of Land Grabbing on Communities in Myanmar* (LOHN December 2015).

land taken from ethnic minority farmers for commercial rubber plantations.[113] It notes that by 2013, 5.3 million acres of land in Myanmar was leased out to investors for commercial agriculture, most without the consent of the owners.[114] Most acts of land confiscation followed a similar process where legal procedures were not followed, compensation was not provided and those affected were not consulted and forcibly evicted.[115] An example of this is visible in the scenario of the Monywa copper mine, operated by a Chinese company in partnership with a military-owned company. A 2015 report by Amnesty International found that, since the Monywa project's inception in 1976, thousands of people have been forcibly evicted by the government with the knowledge, and in some cases the participation, of foreign companies.[116]

Despite the formation of several non-judicial committees and commissions, government efforts to address land-related issues have been slow, incomplete, and marred by confusion and a lack of coordination.[117] In 2012, the parliament established the Farmland Investigation Commission (FIC), a body tasked with investigating reports of land confiscation and making recommendations for the restitution of land. From September 2013 to January 2016, the FIC submitted to the President's Office 18 reports that investigated past cases of land confiscation by various actors in a wide range of economic sectors.[118] The FIC received over 26,000 complaints from alleged individual and community victims of land confiscation - of these, as of early 2016, it investigated some 13,000 cases.[119] The FIC, however, did not have the power to implement its findings or to refer cases to courts or the relevant government bodies for action. When the FIC and the Land Utilization Management Central Committee - which had been established to implement the FIC's recommendations - were dissolved in 2016, they left behind thousands of un-investigated cases.[120]

In May 2016, the President's Office formed the Central Review Committee on Confiscated

[113] Global Witness (n 21).
[114] Ibid.
[115] Displacement Solutions, *Restitution in Myanmar. Building Lasting Peace: National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Programme* (Norwegian Refugee Council March 2017).
[116] Amnesty International (n 21).
[117] FIDH (n 21).
[118] Republic of the Union of Myanmar, Farmland Investigation Commission, Report no 1-18, September 2013-January 2016.
[119] Myanmar Centre for Responsible Business, *Land* (IHRB 2015).
[120] Mekong Region Land Governance, *Transparency Under Scrutiny Information Disclosure by the Parliamentary Land Investigation Commission in Myanmar* (MRLG 2017); Frontier Myanmar, 'Leftover land dispute vex government as discontent grows' 12 April 2017.

Farmlands and Other Lands (CRCCF), which currently deals with cases of land confiscation.[121] The CRCCF set the unrealistic goal of settling all land dispute cases within the first six months of its mandate (i.e. by November 2016).[122] The process of land restitution has been slow, filled with allegations of corruption, with thousands of cases still to be investigated. As of April 2017, the CRCCF had a backlog of 10,891 cases to investigate, including 6,707 that it had inherited from the FIC.[123] Only 2,057 cases, or about 19%, had been settled and the land was returned to the original land users.[124] According to one estimate, the military and local and regional governments returned about 400,000 acres of land.[125] Corporations, however, have not yet returned confiscated land, except in a few cases, which remain rare, are largely *ad hoc* in nature, and are driven more by attempts at improving company reputations rather than securing the rights of victims.[126]

Conclusion

This chapter has analysed efforts in three countries (Colombia, South Africa and Myanmar) that have emerged form conflict or repression to restitute land – including land that was acquired or confiscated for economic investment. Of the three, the Colombia's Victims Law represents the best practice. Partly this is due to the difference type of 'transitions' in the three countries, which are hard to compare. Colombia is emerging from an internal armed conflict. South Africa ended the apartheid regime. And in Myanmar, despite the 2015 democratic elections, the transition to peace and democracy is far from complete - the military still holds 25% of seats in Parliament and important ministerial positions, and the prosecution of the Rohingya, a Muslim ethnic minority, reached peaks of crimes against humanity and genocide allegations in 2017.[127] Arguably, it is easier to return land that was confiscated by armed groups after the conflict is over (in Colombia) than land that was allocated by a repressive

[121] Government of Myanmar, Union President Office, Notification 14/2006, 'Formation of the Reinspection Committee of Farm Land and Other Land Acquisition', 5 May 2016.
[122] Irrawaddy, 'Govt Committee to settle all land grabs cases in six months' 1 July 2016.
[123] Frontier Myanmar, 'Leftover land dispute vex government as discontent grows', 12 April 2017.
[124] Ibid.
[125] Namati, *Returns of Grabbed Land in Myanmar: Progress After 2 Years* (Namati 2015). See also, The Irrawaddy, 'Whose Land is it Anyway?' 7 July 2016.
[126] Displacement Solutions, *Land Acquisition Law and Practice in Myanmar: Overview, Gap Analysis with IFC PS1 & PS5 and Scope of Due Diligence Recommendations* (Displacement Solutions 2015), 17.
[127] Human Rights Watch, 'Burma: Satellite Imagery Show Mass Descruction' 19 September 2017; Amnesty International, 'Myanmar: Scorched-earth campaign fuels ethnic cleansing of Rohingya from Rakhine State' 17 September 2017; Fortify Rights, 'United Nations: Establish Independent Investigation into Genocide in Myanmar' 29 October 2015.

regime (in South Africa) or land that was confiscated by a military government that still holds power (in Myanmar). However, from the point of view of victims of land confiscation, their demands to restitution are similar.

While in Colombia the Victims' Law addressed the responsibility of companies, the transitional legal arrangements put in place in South Africa shielded individuals and businesses responsible for human rights violations and instead guaranteed the protection of existing land titles.[128] The cost of repairing injuries was placed on the shoulders of the post apartheid state only, to be dispensed through public funds, and in that sense through a cost borne by the whole of society rather than those most responsible for the violations.[129] All transactions had to be financed with public funds and actual land transfers were based on the 'willing buyer, willing seller' principle. A question that ought to have been addressed, but that was avoided, was whether those who benefitted from dispossession - individuals and corporate owners who obtained land cheaply from the previous government and may have developed it with cheap labour - had any responsibility in the restitution process. In this sense South Africa's restitution programme recognized the victims of land dispossession, but it did not address the responsibility of the beneficiaries.[130]

In Myanmar, the NLD-led government has failed to make significant progress towards the fulfilment of the party's election promises with regard to land rights. In its 'Election Manifesto,' published ahead of the November 2015 general election, the NLD vowed to ensure the return to farmers of 'illegally-lost land' and the payment of compensation.[131] The document also promised the party would work towards defending farmers against 'illegal land confiscation practices' and amending the existing land laws 'that are not appropriate for the present era.'[132] Despite this stated commitment to resolve the country's land disputes, land confiscation has continued under the NLD-led administration, and military-owned and 'crony' companies still control the economy.[133] Protests against land confiscation are increasingly

[128] M Chaskalson, 'The Property Clause: Section 28 of the Constitution' (1994) 10 South Africa J Human Rights 131.
[129] du Bois (n 96).
[130] U Dhupelia-Mesthrie, 'Urban Restitution Narratives' in Walker and others (n 94), 83.
[131] National League for Democracy (NLD), Election Statement, 15 September 2015.
[132] Ibid.
[133] FIDH (n 21); Pietropaoli (n 21).

common.[134]

The NLD-led administration has also failed to implement the National Law Use Policy (NLUP), which was adopted by the previous government in January 2016 in order to harmonize land use management and protect farmers' rights.[135] While the NLUP is not a legally binding instrument, it referred to human rights standards with regard to land acquisition and recognized traditional land ownership and shifting cultivation regimes.[136] This is important because in Myanmar approximately half of the land is occupied or subject to shifting cultivation according to traditional farming practices, but it could be classified as 'vacant, fallow, or virgin', and therefore subject to acquisition under the 2012 *Vacant, Fallow and Virgin Lands Management Law*.[137] This law, enacted after the beginning of the reform process, gives the government the right to repossess lands classed as 'vacant, fallow and virgin' for the implementation of infrastructure projects or special projects required in the 'interest of the state.'[138] The law establishes a Central Committee that can lease to local and joint venture investors for up to 30 years land that the state considers as being not in use.[139] The law does not set out any procedures to challenge or seek a judicial review of measures that authorize land confiscation, but it punishes with prison terms of up to three years anyone found guilty of trespassing, obstructing the implementation of business, or who 'fails to leave' vacant, fallow, and virgin land.[140] These provisions can be used to take legal action against protestors who seek remedy for the confiscation of their land.[141] In short, not only land restitution rights are not addressed, but the Vacant, Fallow and Virgin Law allows for an easy and 'legal' confiscation for economic investment of additional land, which is currently used by farmers who lack any formal title (Myanmar does not recognise customary land rights), but have nevertheless cultivated such land for generations.

[134] FIDH (n 21).
[135] National Land Use Policy (NLUP), National Land Resources Management Central Committee, January 2016,
[136] Ibid,. Chapter 10. See also, Frontier Myanmar, *A sound basis for land reform*, February 2016.
[137] Land Core Group, *Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law* (2012).
[138] *Vacant, Fallow and Virgin Lands Management Law*, Art 3, 55.
[139] Ibid., Art 4, 5, 10, 11(c).
[140] Ibid., Art 26-29.
[141] FIDH (n 21).

CONCLUSION

This research shows that innovative use of litigation, truth-seeking and reparations programmes in transitional justice countries across the world have addressed, even if still only in a marginal way, corporate accountability for human rights abuses and crimes under international law and have attempted to provide redress for victims. Sporadic victories for victims of business-related human rights abuses have occurred. But for the most part victims face major obstacles to achieve corporate accountability, and corporations involved in violations often enjoy impunity. Put simply, if corporations have committed human rights violations or crimes under international laws during a time of conflict or repression, either directly or in complicity with the states or with individuals, then they should be held accountable and victims should be repaired.[1] Addressing the corporations' responsibility and providing reparations to the victims are not a voluntary pursuit by the state, which has the obligation to bring those alleged to have committed human rights abuses and crimes to justice within their domestic criminal justice systems and to repair the harm suffered by victims. There are, however, complex legal, political, and practical obstacles to this seemly fair concept. Some of these problems, common to all victims of corporate abuses, are accentuated in transitional justice contexts due to the prevalence of weak rule of law, dysfunctional judicial systems, corruption, and logistical difficulties.

This research has sought to answer how remedies for corporate human rights abuses and crimes under international law can be achieved in transitional justice contexts. It has done so by analysing how different mechanisms available to victims of corporate abuses in transitional justice contexts across history and across countries have, or failed to, achieved corporate accountability, and provided appropriate reparations to victims of corporate abuses. The analysis has focused on three types of processes, which constitute the core of transitional justice: i) judicial mechanisms at the international, regional and national level; ii) truth-seeking initiative; and iii) administrative reparations programmes.

[1] A Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 JICJ 899; E Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6 Northwestern J Intl Human Rights 222; SS Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 American Criminal L Rev 1481.

The post-World War II trials, analysed in Chapter I, have helped to understand the role that business enterprises play in times of conflict or repression, to develop criteria of responsibility, and there is evidence that criminal charges against corporations were considered entirely permissible.[2] Corporations, however, were not prosecuted as legal entities *per se*. More than five decades later, a proposal for a restricted form of corporate criminal liability in the *Rome Statute of the International Criminal Court* failed.[3] At present, the only business actors capable of being prosecuted before the ICC are individual businesspeople, although so far the court has not done so. An expansion of the ICC jurisdiction to include corporations may in theory happen in the future, but this is currently unlikely. The new OTP focus on thematic prosecutions on crimes committed by means of natural resources exploitation and land confiscation may expand the remit of the ICC to address crimes where corporations are often involved, but how this may result in corporate accountability remains to be seen. Even if corporations were in the future accepted as subjects of the ICC, and even considering the focus of the OTP over natural resources exploitation and land grabs, corporations remain unlikely to become the primary focus of an ICC prosecutor. The contextual element of war crimes and crimes against humanity and the specific intent required for genocide limit the scope of application of international crimes at least in practical terms. Thus, while international criminal law could address crimes attributable to corporations, it would intervene only in extraordinary circumstances.[4] Businesspeople and corporations would rarely meet the criteria for ICC prosecution as in most cases they are not among those masterminding international crimes, but they, for the most part, rather benefit from a given situation and exploit the financial opportunities. Therefore the responsibility of corporations for their involvement in international crimes has been of marginal interest in international prosecution efforts.[5] This is

[2] JA Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 Colom LR 1094, 1239; A Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations' (2002) 20 Berkeley J Intl Law 105.

[3] See Chapter I.2. See also, K Haigh, 'Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns' (2008) 14 Australian J Human Rights 199; L Van den Herik, 'Subjecting Corporations to the ICC Regime: Analysing the Legal Counterarguments' in C Burchard, O Triffterer and J Vogel (eds.), *The Review Conference and the Future of the International Criminal Court* (Kluwer 2010), 155.

[4] N Farrell, 'Attributing Criminal Liability to Corporate Actors Some Lessons from the International Tribunals' (2010) 8(3) JICJ 872.

[5] F Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8(3) J Intl Criminal Justice 783, 801; W Kaleck and M Saage-Maab, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes The Status Quo and its Challenges' (2010) 8(3) JICJ 700, 710.

arguably a necessary limitation of international criminal law that remains unlikely to be overcome. For these reasons, international criminal law does not currently offer an effective avenue to seek remedy for corporate human rights abuses in transitional justice contexts.

The regional systems are rarely mentioned in the scholarship on business and human rights or on transitional justice. But Chapter II demonstrates that regional systems have, and could further, indirectly provide remedies for victims of corporate abuses and shape national reparation programmes in transitional justice contexts by examining complaints against states for failing to prevent, investigate or redress human rights violations related to corporate activities.[6] The Inter-American Court of Human Rights, in particular, has provided important contributions to the analysis of evidence of corporate abuses and the provision of remedy and reparations for victims, including in transitional justice contexts.[7] A decision of the African Commission of August 2017 ordering the Democratic Republic of the Congo to investigate the role of an *Anvil Mining* in a village massacre during the 1998 civil war also provides innovative precedents in this area that could grow into more meaningful and effective quests.[8] As such, the regional systems can offer a complementary avenue for victims that have failed to obtain justice and reparations at the national level. This is particularly important in transitional justice contexts where national litigation is rarely an effective option. But their effectiveness is mined by a number of limitations. Proceedings are extremely lengthy as the case against *Anvil Mining* demonstrates. And, ultimately, the national governments have to implement the recommendations of the regional systems. To date they have done so only to a limited extend.

Civil claims and prosecutions against companies for violations committed in times of conflict or repression have been attempted in a number of countries, as detailed in Chapter III, but they are still the exception, and have rarely been successful in establishing corporate accountability and providing redress for victims.[9] There are obstacles both in the host and the home state. Systematic flaws in the domestic regulation and the judicial system due to lacks of institutional capacity and resources are likely to occur in the host states in a transitional

[6] A Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 AJIL 1.
[7] eg, Inter-American Court of Human Rights (IACtHR), *Santo Domingo Massacre v. Colombia* (2012), 135; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (2013).
[8] African Commission on Human and Peoples' Rights (ACHPR), *Institute for Human Rights and Development in Africa and Others v. Democratic Republic of Congo*, Communication 393/10, 9 June 2016.
[9] B Stephens, 'Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?' (1997) 60 Alb L Rev 579, 604.

context, and often as a result victims are not in a position to bring claims against companies in their countries, where the abuses have occurred. The political instability in post-conflict and transitional contexts adds to the challenge. Home states remain equally reluctant to hold multinational companies accountable. Attempts to achieve legal accountability of corporations through extraterritorial jurisdiction face serious obstacles as the complicated history of the *South Africa Apartheid Litigation* and the narrowing of the exercise of extraterritorial jurisdiction in *Kiobel* demonstrate.[10] Most human rights lawsuits against corporations are dismissed on procedural grounds in the early stages of litigation.[11] Many have dragged for years or even decades after the violations allegedly occurred, questioning weather even a decision on the merits could ever provide real accountability and redress.[12] To date, the few cases that have survived legal procedural challenges, and have not been dismissed, have been settled before trial.[13] No case against a corporation alleging violation of human rights or crimes under international law has been decided on the merits yet. Few businessmen have been convicted for crimes under international law, but currently no criminal cases alleging criminal responsibility of corporations for human rights violations or crimes under international law has resulted in a conviction (although this is currently being attempted in France and a few other countries).[14]

As part of their mandate, some truth and reconciliation commissions (TRCs), listed in Chapter IV, have investigated the different actors involved in the past conflict or repression, including corporations. As such, they have played a unique role in establishing an official record of corporations' involvement in past abuses. TRCs have named specific companies, published data on the wealth they amassed, and recommended prosecutions. For example, the South Africa TRC recognised the role of business to maintain the *status quo* of the apartheid society.[15] It submitted that there were legal grounds for instituting claims for reparations

[10] C Abrahams, 'Lessons from the South African Experience' in S Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013), 153.
[11] eg, *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *In re Union Carbide Corp Gas Plant Disaster at Bhopal*, 634 F. Supp 842, 850-51 (S.D.N.Y. 1986). See also, S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004); K Gallagher, 'Civil Litigation and Transnational Business: An Alien Tort Statute Primer' (2010) 8 J Intl Criminal Just 745, 751-53; R Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3(1) City Univ Hong Kong L Rev 1. See Chapter III.2.
[12] eg, *ExxonMobil*. See Chapter III.2.
[13] eg, *Talisman*, *Shell* (in *Kiobel*), *Chiquita*, *Drummond*, *Total*. See Chapter III.2.
[14] French courts are currently investigating *Amesys*, *Qosmos*, and *LafargeHolcim* for complicity with the regimes in Libya and Syria. See Chapter III.1.
[15] Truth and Reconciliation Commission of South Africa, *Final Report* (1998), Vol 4, Ch 2.

against corporations (which finally resulted in the *Apartheid Litigation* filed in the United States)[16] and recommended business to provide reparations. The Liberian TRC concluded that corporate actors across different sectors were involved in human rights violations.[17]Truth commissions' recommendations to finance reparations programmes and simultaneously address corporate have been, however, largely ignored by the governments. Truth commissions usually only have the power to recommend reparations; they do not have the power to directly pay them, and the task of making reparations usually falls to government.[18] In the end, none of the recommendations for prosecution or reparation concerning corporate involvement in abuses recommended by the TRCs in South Africa, Liberia, and East Timor was followed by the respective governments.

Finally, as discussed in Chapter V, administrative reparation programmes can provide a variety of measures for violations related to business activities, for whole classes of victims rather than in response to individualized justice sought through the courts. New administrative programmes in relation to the redress for victims of corporate abuses have been attempted in the area of restitution, in particular land restitution. Colombia, for example, is attempting an innovative land restitution programme, under which some companies may be forced to return land obtained during the conflict.[19]

This research contributes to the literature on transitional justice, international human rights law, and business and human rights in six ways: i) by linking transitional justice and corporate accountability and their goals; ii) by arguing that transitional justice cannot be 'holistic' if it overlooks corporate accountability; iii) by showing that the transitional justice 'toolbox' can offer unique remedies for corporate human rights violations committed during times of conflict or violence; iv) by comparing different transitional justice mechanisms and their complementarities in calibrating corporate roles in gross human rights violations and seeking remedies; v) by understanding how the financing of reparations can be made by corporations

[16] *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). See also, M Swart, 'The Khulumani Litigation: Complementing the Work of the South African Truth and Reconciliation Commission' (2011) 16 Tilburg Law Review, 30.
[17] Truth and Reconciliation Commission of Liberia, *Consolidated Final* Report, 30 June 2009, Vol 3.
[18] T Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2002) 23 Mich J Intl L 977, 1002.
[19] Government of Colombia, *Ley de Víctimas y Restitución de Tierras* (Victims and Land Restitution Law), no 1448 (10 June 2011). See Chapter V.1.

based on a 'polluter pays' type principle; vi) by emphasising the 'power versus justice' dilemmas of societies in transition.

First, as both fields of transitional justice and corporate accountability are expanding they may, arguably, converge. In the words of Ruben Carranza:

> There is now more pluralism and transitional justice has evolved from being narrowly focused on physical integrity violations to recognizing that armed conflict, political violence and repression cannot be de-linked from their economic and social causes and consequences. The way taken by transitional justice to get to where it is now might be a helpful map for those working on corporate accountability.[20]

Both transitional justice and corporate accountability approaches are developing continually. Transitional justice has moved away from a narrow focus on the most serious civil and political rights violations committed by state actors, to include also economic, social and cultural rights, to then explore 'economic violence' such as corruption and exploitation of natural resources, to finally consider also the role of economic actors.[21] The case of Argentina is emblematic: in 1983 CONADEP was mandated to investigate only cases of enforces disappearances during the dictatorship; in 2015 the government passed a bill establishing another truth commission, mandated to investigate the complicity of corporations and financial institutions in the repression.[22] When Latin American countries emerging from military dictatorships began their pursuit of transitional justice, they were not concerned with holding corporations accountable; they were concerned with finding a balance between prosecuting individual perpetrators and responding to demands for truth and reparations.[23] But later, Argentina, Brazil, and Colombia among other countries have started to seek the truth about

[20] R Carranza, 'Transitional Justice, Corporate Responsibility and Learning from the Global South' 28 April 2015 <http://jamesgstewart.com/transitional-justice-corporate-responsibility-and-learning-from-the-global-south/?subscribe=success#blog_subscription-2> (accessed 10 September 2017).
[21] J Cavallaro and S Albuja, 'The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond' in K McEvoy and L McGregor (eds.), *Transitional Justice from Below, Grassroots Activism and the Struggle for Change* (Hart 2008), 122; Elena Andreevska, 'Transitional Justice and Democratic Change: Key Concepts' (2013) 20 Lex et Scientia Intl J 54, 55; M Mutua, 'What Is the Future of Transitional Justice?' (2015) 9 Intl J Trans Just 1; R Duthie, 'Transitional Justice, Development, and Economic Violence' in ND Sharp (ed.), *Justice and Economic Violence in Transition* (Springer 2014), 165, 168.
[22] Government of Argentina, *Ley de creación de la Comision Bicameral de la Verdad, la Memoria, la Justicia, la Reparación y el Fortalecimiento de las Instituciones de la Democracia*, Law no. 27217, 3 December 2015. See Chapter IV.2.
[23] Carranza (n 20).

economic crimes and the links between businesses and perpetrators of human rights violations during the conflict and dictatorships.[24]

Simultaneously to the expansion of transitional justice, the business and human rights field is also developing. While international human rights treaties impose obligations only on states, it is now accepted that corporations do have responsibilities. The international legal framework has evolved accordingly with the adoption, for example, of the Guiding Principles in 2011.[25] A draft of an international treaty on business and human rights, currently under negotiation at the UN, will be presented at the third section of the intergovernmental working group in October 2017.[26] The proposed treaty may provide what is still lacking: a proper enforcement mechanism to address the current accountability gap.

Although the path has not been a linear and smooth one, criminal and civil litigation alleging corporate involvement in past abuses in both the home and host countries is being incessantly pursued. Currently, impunity is still the norm and cases resulting in corporate accountability are few and far between, but the progress is in the direction of more accountability, not less. Business enterprises involved in human rights abuses or international crimes are, and will continue to be, pursued in domestic jurisdictions. Victims and their representatives across jurisdictions are challenging normative and practical obstacles, and fighting to develop standards for imposing liability upon corporations for their human rights abuses.[27]

Second, bringing the economic perpetrators or accomplices that made many of the violations possible into the orbit of transitional justice would provide for a more complete and holistic justice. Transitional justice aims to achieve justice, to establish an account of the truth about the past, to provide reparations for victims and their families. Corporate accountability mechanisms share some of the same aims – to provide justice for victims of corporate abuses, to provide them with access to justice and remedy. Transitional justice is intended to address

[24] See Chapter IV.2.
[25] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, annexed to Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Business Enterprises, John Ruggie, A/HRC/17/31 (21 March 2011)
[26] UN Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other Business Enterprises with respect to human rights, 26 June 2014, Res 26/1.
[27] MB Taylor, RC Thompson and A Ramasastry, *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses* (Fafo 2010).

past abuses, and corporations are often tied up with these abuses. As the field of transitional justice and corporate accountability are continually evolving, and converging, future approaches should give greater attention to the accountability of companies responsible of past violations.

Corporate accountability is part of a broader debate within transitional justice and international criminal law about how economic crimes should be addressed.[28] It has become impossible to overlook the reality that in an increasing number of conflicts, alongside atrocities perpetrated by state actors on civilians, a pattern of war economies has emerged, particularly around the exploitation of natural and mineral resources. The way in which war is fought, supplied and financed is more complicated than ever and there is a concomitant need for transitional justice to adapt to these modern realities. Arguably, the transitional justice focus on business enterprises operating in regions affected by armed conflict and instability, and their potential involvement in, or contribution to, human rights abuses and crimes under international law is going to increase. Corruption and other economic crimes, land confiscation and natural resources exploitation, and corporate accountability are all part of a broader set of grievances that many in the field of transitional justice simply regarded as background, but did not consider inherent to the work of prosecutors, truth commissions, or reparations programmes. That is changing, as this research has shown.

Third, the most serious corporate abuses happen in times of conflict and it is precisely transitional justice with its 'toolbox' that offer the most interesting avenues for corporate accountability. In a 'non-conflict' situation corporate accountability is generally limited by the legal obstacles at the national level and the lack of personality under international human rights law. In a transitional justice contexts there are other available processes to establish corporate accountability and redress for victims, namely truth commissions and reparations measures. Disputes related to access to land provide the clearest example of the convergence of the two fields.

[28] ND Sharp, 'Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice' (2012) 35 Fordham Intl L J 780; R Duthie, 'Toward a Development-Sensitive Approach to Transitional Justice' (2008) 2 Intl J Trans Just 292; P Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2007); K Andrieu, 'Dealing With A "New" Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?' (2012) J 11(4) Human Rights 537.

Land grabs and forced displacement often occur outside the context of armed conflict - millions of people have been displaced, often without compensation, by dams, extractive projects, palm oil plantations, large infrastructure and other 'development' projects. In this sense, the line between conflict- and repression-related violations and the 'normal' development process is blurry. One such case is Kenya. Successive waves of land dispossession and transfer lie at the heart of Kenya's ethnic and political tensions. Disputed access to land is often cited as one of the key structural causes of violence in the country.[29] The question is whether the forced dispossession of the traditional lands in Kenya is part of a transitional justice narrative connected to forced dispossession for political gain, or of a resource privatization narrative connected to economic investment. In other words, whether or not this is a 'transitional' violation that can be redressed using the mechanisms of transitional justice. Unlike the South African or Colombian cases, here the dispossession was not in the service of a violent political or military campaign, but simply a result of greed, and misplaced development objectives. From a victim's point of view, however, the effect on the dispossessed is similar, as is the denial of remedy and corporate accountability.

In a case of land confiscation by a company, directly or in complicity with the government, in a 'non-conflict' situation (i.e. for natural resources extraction, large infrastructure projects, or agribusiness activities), corporate accountability and remedies can only be attempted through litigation in the host country and possibly in the host country is the company is a multinational. For 'ordinary' land expropriations or dispossessions, justice and remedy are supposed to happen as a matter of due process. If the same land confiscation happened in a conflict situation, transitional justice offers other options: truth commissions can recommend the restitution of land and the prosecution of companies; reparations measures, like in Colombia, can force companies to return land; and there could be a possibility of the ICC Prosecutor's Office examining the case to verify if an international crime has been committed by means of such land confiscation. What makes transitional justice processes programmes feasible is precisely that they are 'transitional,' that is, exceptional.

Fourth, transitional justice offers tools for human rights advocates that have adopted a 'hybrid' approach to promoting corporate accountability and use both transnational litigation and non-

[29] N Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in Sharp (n 35), 131; C Huggins, 'Truth, Justice, Reconciliation, and… Land Tenure Reform?' (29 July 2009) Oxford Transitional Justice Research Working Paper Series, 1-2.

judicial mechanisms. Courts are clearly critical for setting standards of legal obligation and through litigation it is possible to secure financial damages for victims of corporate abuses.[30] But pursuing individual cases through courts tends to be an incomplete way of addressing the scale of the challenge represented by the victims in post-conflict settings.

Courts only have the capacity to attend to a limited number of cases, and rely heavily on victims being able to come forward and articulate their claims before the legal system. The scale of the challenge and the difficulties associated with access to justice for all make this a piecemeal effort at best. In addition, compensation achieved through tort litigation is limited to a narrow number of victims, who qualify as plaintiffs under procedural rules. Decisions, as outcome of a legal process, may be of considerable importance for those applicant victims, but would not have an effect on other victims, who may have also suffered similar violations. Judicial reparations can work well in contexts where human rights violations are the exception rather than the rule, and as a consequence the number of victims is limited, the specific human rights violations are easy to establish, and the evidence to prove is not too problematic.

In transitional justice contexts where governments seek to repair massive violations of human rights to a large number of victims, administrative reparations programmes may be a better-suited mechanism for redressing harm.[31] They offer reparation to broader categories of victims, instead of just the plaintiffs in a legal case, thus preventing unequal treatment of victims for reparations, and can be implemented through faster procedures with more flexible evidentiary standards.[32] While not usually able to respond to the variables of each individual case, a reparations programme can create generally descriptive classes of victims or their surviving family members who, given similar circumstances, can be treated alike. When implemented well, such programmes can have a much broader reach than court-ordered redress, both in terms of the numbers who find some reparation and also in terms of the holistic nature of the measures undertaken.[33] While the state is responsible to implement them, administrative reparation programmes may result from recommendations made by TRCs and even by the

[30] E Harper, 'Delivering Justice in the Wake of Mass Violence: New Approaches in Transitional Justice' (2005) 10 J Conflict Security Law 149; SR Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001), 111 Yale L J 443, 446-448, 461-475; B Stephens, 'The Amorality of Profit' (2002), 20 Berkeley J Intl L 45, 46-48.
[31] UN OHCHR, *Rule of Law Tools for Post-conflict States: Reparations Programmes* (2008).
[32] Ibid.
[33] International Center for Transitional Justice, *Reparations in Theory and Practice* (ICTJ 2007), 3-4.

regional systems. Such recommendations might include the responsibility of business to contribute to reparations programmes, an avenue that would need to be pursued with greater vigour if societies are to achieve the full benefits of a transitional justice journey. Administrative programmes and civil litigations are anyway, not always mutually exclusive options. The Peruvian TRC formulated an interesting position in this respect: receiving benefits from the reparations plan does not leave without effect civil lawsuits against the state, but should not interrupt or impede penal cases against perpetrators.[34] This approach preserves victims' access to judicial avenues, while protecting the stability of the reparations programme.[35]

Fifth, corporations found responsible of past abuses can finance reparations programmes. Different countries have adopted different models for the financing of reparations.[36] But for the most part, states have paid for reparations even when non-state actors committed violations, on the basis of that the state failed to protect and ensure rights. For example, transitional justice developments in Brazil had initially focused on an 'abstract model' of accountability whereby the state as a whole assumed responsibility for the violations carried out by government officials, but avoiding investigation or prosecution of the individual or corporate perpetrators and accomplices.[37] Corporate responsibility to achieve reparation is difficult to address within the binding legal framework because many situations of corporate abuses lack an adequate legal-factual link that establishes responsibility. Consequently, the state assumed the responsibility of providing reparations through a programme of moral and economic redress to the victims, without looking for specific individual or corporate accountability.[38] While this may be legally correct, normally a much wider range of actors would be expected to bear responsibility for endemic and long-lasting systems of oppression.[39]

All reparations programmes face two fundamental and related questions: first, clearly articulating the parameters of who ought to be considered a 'victim', and second, how to select

[34] Comisión de la Verdad y Reconciliación de Perú, *Final Report*, 28 August 2003.
[35] L Magarrell and G Guillerot, *Memorias de un Proceso Inacabado: las Reparaciones en Perú* (ICTJ 2006).
[36] S Darcy, 'Truth Commissions, the European Union and Reparations from Business' in F Medjouba (ed.), *Building Peace in Post-conflict Situations* (BIICL 2011), 47.
[37] JP Bohoslavsky and MD Torelly, 'Financial Complicity: The Brazilian Dictatorship Under the "Macroscope" in DN Sharp (ed.), *Justice and Economic Violence in Transition* (Springer 2014), 249.
[38] Ibid., 252.
[39] E Schmid, 'War Crimes Related to Violations of Economic, Social and Cultural Rights' (2011) 71(3) Heidelberg J Intl L 540.

the human rights violations from among the many that occurred, that would and ought to trigger reparations. For a reparations programme to make sure that every victim is a beneficiary it would have to extend benefits to *all* the victims of *all* the violations that may have taken place during the conflict or repression. No programme has achieved such comprehensiveness and it is hard to foresee how this could be reasonably achieved. Generally, reparations, both through courts and through administrative programmes, have been limited to monetary compensation for violations of what are perceived as core rights to physical integrity: killings, forced disappearances, torture, and arbitrary detention, to the survivors or to the families of the victims of those violations.[40] This is the case of early reparations, for example in Chile and Argentina.[41] The South Africa's TRC also adopted a constrained 'closed list' approach when it established the requirements for reparation eligibility.[42]

That reparation programmes have concentrated on these types of violations is not unjustified. The states where reparations are needed are generally poor, with many competing challenges and few resources. The number of victims and survivors may run to the tens or hundreds of thousands, with varied needs. When the resources available for reparations are scarce, choices have to be made and, arguably, it makes sense to concentrate on what are perceived to be the most serious crimes. Conversely, attempting to provide reparations for too broad a category of violations would be prohibitively expensive, and would also risk turning reparations into a 'theory of everything'.[43] As Roht-Arriaza puts it, 'Reparations are…a limited category of responses to harm.'[44] No programme has, however, explained why the victims of some violations were eligible for reparations and others not. As a consequence of this omission, most programmes have ignored types of violations that perhaps ought to have been included. In particular, only few reparation programmes have addressed rights violations mostly associated with business activities, such as land expropriation without compensation and forced displacement. In this sense, only certain victims became fully part of the process of reconciliation, and wider accountability for the economic structure that supported past

[40] P Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2011).
[41] Government of Argentina, Presidential decree number 70 of 1991; Law 24.043 of 1991; Law 24.411 of 1994. Government of Chile, Law 19.123 of 1992. See also, CH Acuña, 'Transitional Justice in Argentina and Chile. A Never Ending Story' in J Elster (ed.), *Reparation and Retribution in the Transition to Democracy* (Columbia University Press 2006), 206, 215-16.
[42] Government of South Africa, Promotion of National Unity and Reconciliation Act (1995), Sect 1(1)(xix)(a), 1(1)(ix).
[43] N Roht-Arriaza, 'Reparations and Economic, Social, and Cultural Rights' in Sharp in Sharp (n 37), 110.
[44] Ibid., 114.

violations may be lost.[45] Overall, administrative programmes in transitional justice contexts have often overlooked the role of corporations in reparations programmes both from the point of view of the victims (the harms suffered by victims of corporate abuses have rarely been fully repaired) and the perpetrators (corporate actors responsible of violations have rarely paid reparations). The responsibility of companies to provide reparations has, as a consequence, not been given adequate consideration.

Finally, the investment and economic activity that a corporation (especially a multinational corporation) could bring may be more appealing to a post-conflict state than the need to redress its citizens for violations committed by the company. Transitional governments, often reliant on revenues generated by corporate entities, have a vested interest in not investigating or prosecuting corporations. In addition, as a rule, it is the political or the military elites that change first. As a result, situations of transition after conflicts and repression have often lead to the prosecution of political elites. By contrast, industry and business constitute a continuum in most societies, which may explain why there is often no drive for a determined legal remedy for these cases. Countries in transition are often in state of economic collapse and corporations are seen as critical for economic progress. As a result, even if economic actors have substantially contributed to the systemic injustice, they may not be held accountable, in a tacit promise to contribute to the economic recovery. This tendency can be observed in the post-World War II cases, as well as later in the South African truth and reconciliation process and the initial position of the South African government towards claims of the *Apartheid Litigation*.[46] It can also explains the lack of political will by the part of governments in implementing TRCs recommendations regarding business. Those who may have benefited from corporate operations and remain influential in government may obstruct commissions' operations if they believe it endangers their economic interests. For instance, the South Africa, Liberia, and East Timor's TRCs all attributed responsibility to corporations and recommended for businesses to pay reparations, but the respective governments lacked the political will to implement the commissions' proposals. So far in the battle between economic power and justice the former has won.

[45] R Meister, 'Human Rights and the Politics of Victimhood' (2002) 16(2) Ethics Intl Affairs 91, 95; M Humphrey, *The Politics of Atrocity and Reconciliation: From Terror to Trauma* (Routledge 2002), 121.
[46] See Chapter I.1 and III.2.

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