

Colombia's Quest for Peace and Justice

An explorative study into the link between Transitional Justice and Corporate Accountability, analyzed within the context of Colombian Transitional Justice



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Front Images: Colombian youngsters requesting peace #UnoManoPorLaPaz

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Acknowledgements

With great pleasure I hereby present my thesis titled '*Colombia's Quest for Peace and Justice*', which contains a case study research into corporate accountability in past transitional justice experiences, and an analysis of the role and responsibilities of corporations within the Colombian transitional justice context. This thesis can be seen as the concluding piece of the masters program "Conflicts, Territories and Identities" of the Human Geography Department and the Centre for International Conflict Analysis and Management (CICAM) of Radboud University Nijmegen. With the completion of this work, there comes an end to a process of studies and research that I have experienced as very inspiring and insightful. The whole process has been a valuable contribution towards my future career in the area of Conflict Studies, and this would not have been possible without the assistance and effort of people involved in this process.

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Executive Summary

This research aims to develop new theoretical insights by bringing together the issue of corporate accountability for human rights violations and settings of transitional justice. The issue of corporate accountability for human rights violations is a much debated theme within the area of business and human rights. Although the UN Guiding Principles on Business and Human Rights have been developed as a framework to delineate the responsibilities of corporations to respect human rights, these recommendations have always been non-binding. Besides, holding corporations accountable of alleged involvement in human rights violations via the judicial way seems to be extremely difficult and often leaves the victims without sufficient redress. Thus, whereas the impact of corporations on the daily lives of individuals has rapidly expanded in the past decades, the development of their normative human rights obligations has largely lagged behind. During the last decade, more and more cases of alleged direct or indirect involvement of corporations in human rights violations have become public and received growing attention. Often, the complicity of corporations in these human rights violations has taken place under repressive regimes. This is what can be seen in Argentina and Brazil at the moment, where cases against Ford, Mercedes, and Volkswagen are currently pending, accused of corporate complicity in human rights violations carried out under the repressive regime. The same can be said about Colombia, where alleged involvement of corporations in human rights violations carried out by paramilitary troops has come under increasing attention.

With the decades-long internal armed conflict in Colombia that is coming to an end, as the ongoing peace talks between the FARC and the Government gradually evolve to a peace agreement, the country faces the challenge to effectively deal with the past, in order to establish durable peace. From this point of view, the Colombian transitional justice setting provides a unique opportunity to hold accountable all actors who played a role in the human rights violations carried out in the internal armed conflict, including corporations that aided or abetted to such violations. The setting of transitional justice provides multiple ways of corporate accountability, as it provides a legal tribunal, as well as extra-judicial transitional justice mechanisms. The establishment of both kinds of proceedings is decided in the recently developed agreements on Transitional Justice and Victim Compensation. As stated within the Colombian peace agreement, all those who have directly or indirectly participated in the internal armed conflict fall under the jurisdiction of the Colombian transitional justice process.

As the exact details of how the Colombian Transitional Justice deal will be implemented are still unknown and the corporate accountability issue remains heavily debated, impunity prevails in transitional justice processes where justice is sought. As can be concluded from the various case studies conducted in this research, the previous experiences of corporate accountability in

transitional justice processes serve more as cautionary tales than genuine inspirations. Furthermore, it has been found that the underlying socioeconomic problems in the explored cases largely persist, and as a consequence, these countries still continue to deal with this unaddressed legacy. Hence, corporate accountability in transitional justice contexts cannot remain the elephant in the room. It is therefore important that the economic dimension is included within the Colombian transitional justice process, in order to effectively tackle the socioeconomic causes of the conflict. As it was found within this research, corporations in Colombia have been allegedly involved in aiding and abetting the massive human rights violations committed during the last decades of the internal armed conflict. This involvement has been expressed mainly by the relationship between paramilitaries and corporations, which consisted of providing illegal armed forces with financial means and strategic information in order to secure their operations and activities. In this way, corporations have been part of the economic structures that fostered the Colombian conflict.

As a conclusion, it is stated that corporations, in order to fulfill their responsibility to respect human rights, should take an active stance in the Colombian transitional justice process. They should be transparent about their cooperative activities with the paramilitaries and recognize the truth in the Chambers of Justice. Furthermore, what is maybe even more important, is that they acknowledge their wrongdoings, and take part in any reparative measures that will be established in the transitional justice process in order to uphold victims' rights. A possible reparation method that is coined, in this regard, could include the establishment of a joint fund by the state and corporations, with the aim of fully contributing to the restorative measures for the satisfaction of victims' rights. Finally, the provision of a formal apology may be even more valuable for victims, in order to effectively bring closure to the past and rebuild trust relations so that eventually a peaceful society can be built in 'the new Colombia'.

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1 Introduction

After struggling with an internal armed conflict for more than fifty years, which has had detrimental consequences for Colombia, the country now faces a new challenge. With the almost completed peace talks between the government and the FARC, resulting in an upcoming peace agreement, the longest-running conflict in the Western Hemisphere seems to gradually come to an end. This leaves the country with a difficult and complex task: How to deal with the legacy of past atrocities?

The Colombian internal armed conflict has resulted in massive serious human rights violations, including more than 300,000 killings and enforced disappearances, the displacement of more than six million people, forced recruitment of minors, and sexual and gender-based violence (Correa, 2015). With regard to the transitional justice process of Colombia, which will take place after the signing of a peace agreement, all these serious human rights violations have to be addressed in order to bring closure to the past, and serve justice to those harmed.

This research focuses on one particular aspect of the challenging transitional justice context of Colombia: the role and responsibilities of corporations and their part in the Colombian internal armed conflict.

1.1 The globalization of transitional justice

The concept of Transitional Justice was first coined at a time when the world was grappling with problems of governance, legitimacy, democracy and human rights. These issues gained importance after the collapse of the Soviet Union in 1991 and the Latin American transitions from repressive regimes towards the establishment of democracies in the late 1980s. These transitions faced enormous challenges, as nearly all of the former regimes were characterized by massive violations of human rights, undemocratic systems of governance and authoritarian rule omitting accountability. In response to these changing political regimes in Eastern Europe and Latin America, and later also in Asia and Africa, the idea of addressing systematic abuses by former regimes without endangering the political transformations has been gradually developed. Initially, transitional justice initiatives emphasized the rule of law as a crucial factor in establishing and maintaining new democracies with a thorough and careful application of normative rules to ensure justice would be achieved. Although every society has its own unique political and historical context, and therefore its own experiences with such a transition, transitional justice was built on the belief that the struggles of those countries consist of common aspects. As the challenges for those countries in transition in this new historical era became immediately clear, so did the dilemmas within the transitional justice approach. Would it be possible to fairly compensate the victims of the former regime? Moreover, who would be referred to as victims of a system that affected everyone in society? How to prevent the recurrence of abuses

such as those inflicted by the old regime? These are some of the dilemmas practitioners of transitional justice processes had to cope with at that time. The main challenge of transitional justice to deal with the legacy of human rights abuses, at that time, was to strike a proper balance between a whitewash and a witch-hunt, between punishment or pardon (Kritz, 1995; Newman, 2002). It tried to deal with the complex challenge of finding a balance between claims for justice, truth and accountability, and the need for peace and stability (Newman, 2002).

During the 21st century, the field of transitional justice has evolved because of the ever changing political, social and economic contexts in which it has to settle. As a result, Teitel (2014) speaks about the globalization of transitional justice and mentions three major developments that mark this global phase. First, the move from exceptional transitional responses to a “steady-state” justice, associated with post-conflict related phenomena that emerge from a fairly pervasive state of conflict (Teitel, 2014). In this way, the application of the transitional justice approach expanded so that it was not limited to countries in transition, but also applied in “steady-state” cases struggling with the aftermath of large scale abuses in civil or ethnic wars. Second, a shift from a focus on state-centric obligations to a focus upon the far broader array of interest in non-state actors associated with globalization (Teitel, 2014). Some examples of non-state actors within transitional justice processes are for example armed groups like paramilitaries or rebel groups, national and transnational corporations and the media. Transitional justice turned away from its state-centric vision, as the role of such non-state actors in human rights violations is examined and recognized more often. Third, an expansion of the law’s role in advancing democratization and state-building can be observed, towards a more complex role of transitional justice in the broader purposes of promoting and maintaining peace and human security (Teitel, 2014).

Another development within transitional justice is what Sikkink (2011) calls the “justice cascade”. The justice cascade refers to a new emerging trend in the globalization of transitional justice that deals with the criminal accountability of political leaders for past human rights violations through domestic and international prosecutions. In just three decades, state leaders have gone from being immune to accountability for their human rights violations to becoming the subjects of highly publicized trials in many countries of the world (Sikkink & Kim, 2013). The establishment of the International Criminal Court (ICC) in The Hague can be seen as a product of this trend. After the Rome Statute was ratified by 60 countries and entered into force in 2002, the ICC began functioning as the first permanent, treaty-based, international criminal court established for combating impunity for the perpetrators of the most serious crimes of concern to the international community. The ICC has jurisdiction to investigate, try and prosecute individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The establishment of the ICC is part of the

larger debate on the fight against impunity for human rights violations. Although this has been a major step in the fight against impunity, the jurisdiction of the ICC is limited to individuals and has until now mainly focused on state representatives and political leaders.

Throughout the years, transitional justice has been a learning process for both the international community, as well as for the countries in transition and countries dealing with the legacy of large scale abuses during armed conflicts. Furthermore, it has been an awakening for both victims and perpetrators of human rights violations. Victims will become increasingly aware of their rights and the ways in which they can seek remedy for the harm that has been done to them. Perpetrators, on the other hand, will become increasingly aware of their wrongdoings as transitional justice adapts to the specifics of the contemporary globalized era.

The struggle against impunity has been at the heart of the idea of transitional justice since its inception (Tolbert, in ICTJ, 2015). From its origins dating back to the historic movements across Latin America demanding truth and justice for crimes of dictators and military juntas, to truth commissions and international tribunals investigating widespread violations from South Africa to Guatemala, and from Bosnia and Herzegovina to Tunisia. The globalization of transitional justice has uncovered new challenges within the fight against impunity. The appointment of the first UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo De Greiff, is an acknowledgement of the fact that the fight against impunity is still very present and faces new challenges. De Greiff, accompanied by UN experts, stated that it was time to strengthen the UN role to end impunity. He further concluded that "efforts to address impunity must demand transparency and accountability for all state and non-state actors, including not only paramilitary forces, mercenaries, private military companies and terrorists, but also transnational corporations" (UN OHCHR, 2013). It are these transnational corporations that have become the object of scrutiny within the transitional justice debate. Many countries in transition have been, and remain, greatly tempted to adopt amnesties in their transitional justice processes, including blanket amnesties for even the worst violations. However, as De Greiff (2014) argues, these amnesties risk entrenching a culture of impunity and contribute to creating vicious cycles of violence. It is for this reason, that addressing the involvement of corporations in human rights violations as part of transitional justice efforts becomes particularly compelling. Carranza (2008) captures this argument by saying that while the main motivation behind the corporate involvement in human rights violations might be greed, the availability of resources to maintain impunity is clearly just as important a motive. Addressing the corporate involvement in human rights violations within transitional justice processes becomes in this way crucial by breaking with the culture of impunity and the vicious cycles of violence in fragile societies that eventually will be the fundament for a successful transition.

1.2 The business and human rights predicament

Nowadays, corporations often have enormous economic power. Through processes of globalization, the power and influence of transnational corporations has approached and increasingly exceeds that of the states in which they operate (Binnie, 2009). However, whereas the impact of corporations on the daily lives of individuals has expanded in the past decades, the development of their normative human rights obligations has taken a much slower pace (Černič & Van Ho, 2015). Human rights law and principles, as well as transitional justice mechanisms, have until now been largely designed to address the duties of states. However, as Sandoval et al. (in Machilowski, 2013) mentions, progressive developments are increasingly including non-state actors, such as transnational corporations, as possible human rights violators. As a consequence, recent academic work has centered around this issue, focusing on human rights and business, in order to create a framework regarding corporate accountability for human rights abuses. As Ruggie already stated:

“the root causes of the business and human rights predicament lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kind, without adequate sanctioning or reparation” (Ruggie, 2008, p. 3).

As many cases of alleged corporate involvement in human rights violations have become publicly known in recent years, the debate of corporate accountability has become a popular topic in contemporary research. As Sandoval & Surfleet (2013) state, it is becoming clear that corporations can cause and are frequently implicated in serious human rights violations, and that these violations are often more serious and affect more victims in countries undergoing conflict or repression. Therefore, armed conflict, political violence and repression cannot be de-linked from their economic causes and consequences (Carranza, 2015). However, while corporations often operate in countries affected by conflict or repression, the resulting problems are usually not conceptualized as part of transitional justice – that is, how best to achieve a transition to peace and democracy in the aftermath of armed conflict or oppressive and violent regimes (Michalowski, 2013). The governance gaps mentioned by Ruggie can eventually become obstacles of transitional justice processes when they avoid holding accountable all perpetrators of human rights violations, and their impunity might hinder the goal of obtaining justice and obstruct redress to all those harmed. Furthermore, if transnational corporations aren't viewed as responsible but instead receive impunity, victims, and potentially large parts of society, might be left with feelings of dissatisfaction. Therefore, linking the concepts of corporate accountability and transitional justice is compelling and could even potentially

strengthen both transitional justice and corporate accountability processes. The goal of a transitional justice process is to deal with past atrocities in a conflict and to prevent the recurrence of future conflict. When doing so, it aims to establish an account of truth regarding the past, to achieve justice and reparations for victims, and to accomplish institutional reforms. Corporate accountability for human rights violations, in this regard, aims to prevent such violations from occurring and to provide victims with remedies if violations have taken place. Including the role of corporations in transitional justice processes can enhance truth finding and help in determining the role of all relevant actors in the conflict. Without the inclusion of corporate actors in the transitional justice process, truth will inevitably remain partial and the roots and causes of conflict will not be understood. An inclusion of the role of corporations might thus be necessary in order to comprehend the full truth regarding the human rights violations that occurred, the reasons for which they occurred, and their adverse consequences.

1.3 Societal relevance

Although the United Nations Guiding Principles on Business and Human Rights (hereafter referred to as UNGPs) delineate clear rules for the responsibility of corporations to respect human rights and act with due diligence, these obligations were to be implemented voluntarily. Because of this non-binding character of the UNGPs, it can be seen as a toothless mechanism for holding corporations accountable for their role in human rights violations. As De Greiff (2014) already warned, despite these international obligations, only a fraction of perpetrators of massive human rights violations are ever investigated and prosecuted. This has particularly been the case for corporations involved in human rights violations. It is doubtful that the recurrence of violence can be prevented effectively without addressing its main causes and without identifying and holding accountable the main perpetrators, including corporations for being complicit in the human rights violations if their complicity was of sufficient severity (Machilowski, 2013). De Greiff (2014) therefore stresses that it is crucial for states to adopt effective prosecutorial strategies to bring to justice the perpetrators of the atrocities and prevent the recurrence of violence. Hence, as both concepts will continue to change and evolve as the needs of global society for achieving justice develop along new lines of conflicts and future global challenges (Szablewska & Bachmann, 2015), this research tries to connect corporate accountability with transitional justice. With the growing impact of corporations and their involvement in human rights violations in mind, it is therefore essential to frame the role and responsibilities of corporations within transitional justice contexts.

Within such a context, Colombia faces important challenges. Due to its huge amount of natural resources, Colombia's extractive industries attract lots of transnational corporations, for example in the areas of coal mining, iron, oil and banana industry. At the same time, the country is

undergoing a peace process after facing an internal armed conflict for decades. After years of negotiating between the Colombian government and the Revolutionary Armed Forces of Colombia (hereafter referred to as FARC), the peace process now gradually evolves towards a peace agreement. With the agreement on a truth commission to examine past atrocities in the Colombian internal conflict and the recently developed transitional justice deal, important steps towards building a post-conflict Colombia have been made. Now that the peace negotiators speak out so clearly for truth and reparation and against impunity, the transnational corporations cannot remain indifferent. The path in Colombia seems to be paved for an encompassing approach towards transitional justice, which includes responsibilities for corporations involved in human rights violations during the internal armed conflict.

1.4 Scientific relevance

As the globalization of transitional justice has led to undesirable clashes in the business and human rights spheres, it is of considerable importance to establish a link between the two concepts in order to map the role and responsibilities of corporations within transitional justice settings. By doing so, conflicting aspects within both themes can be explored as they come together in the experiences in the transitional justice field. Whereas existing literature on transitional justice processes has largely focused on the political transition and reconstruction of emerging democracies, this research will draw attention to the economic dimension and the role of powerful economic actors within transitional justice processes. With regard to holding these powerful economic actors to account, international practice appears to suggest that corporations are not to be held criminally accountable for their role in human rights violations. Partly, this can be explained by the general belief that prosecutions could be an obstacle to peace, truth and reconciliation in the aftermath of conflict (Sandoval et al. in Machilowski, 2013). Prosecutions, in this respect, are believed to excite feelings of grief and hatred, which would be obstacles to reconciliation and diminish the room for dialogue between perpetrators and victims. Furthermore, the work of corporations is often considered to be crucial for economic progress. As countries in transition are often in a state of economic collapse, the focus in transitional justice has been largely towards economic growth, and thus to corporate impunity. As it may be clear, due to such perceptions, the economic dimension has been largely ignored within transitional justice processes. This has been reflected in the granting of amnesties and the failure to impose sanctions for corporate actors in human rights violations. However, as the field of transitional justice has been developing over the years, new experiences and lessons learned from earlier cases contributed to unveiling and explaining the difficulties of addressing the economic dimension in transitional justice processes. The early hopes that trials and truth commissions focused on core crimes and civil and political rights violations would usher in robust, inclusive democracies

have, not surprisingly, proven difficult to fulfill (Roht-Arriaza in Verbitsky & Bohoslavsky, 2016). Therefore, this research will contribute to the understanding of addressing the economic dimension in transitional justice. As Roht-Arriaza (in Verbitsky & Bohoslavsky, 2016) mentions, patterns of economic inequality and exclusion, and lack of economic, social and cultural rights lie behind many conflicts. As a result, repression is often chosen by governments as a response to demands for greater social justice, or disaffected groups take up arms against the regime, because they have nothing left to lose. Once a government has embarked on a path that will lead to massive human rights violations, it is often armed, financed, informed, or otherwise supported by powerful economic actors (Roht-Arriaza in Verbitsky & Bohoslavsky, 2016). In this way, the economic dimension can be seen as both a cause and consequence of conflict, although it has been largely ignored in past transitional justice processes. Thus, leaving the economic aspects unaddressed means ignoring the causes and consequences of the conflict itself, which is problematic as it will probably lead to a relapse into conflict. Therefore, understanding the complexities as well as the potential in dealing with powerful economic actors in transitional justice settings will be crucial in future policymaking regarding transitional justice. This research will contribute to this debate, as it discloses the challenges of holding corporations to account in transitional justice settings by looking at past experiences from previous transitional justice contexts.

1.5 Research specifications

The aim of this research is to create and make recommendations on a possible framework for corporate accountability within transitional justice settings. By doing so, this research will focus on the economic dimension and establish a link between transitional justice and corporate accountability, unveil its complexities and opportunities, while looking at various examples in the history of this almost non-existing link. The conclusions and lessons that will become visible after examining various case studies will be used in order to delineate a possible framework for corporate accountability in the specific context of transitional justice in Colombia. Therefore, the question that will be central throughout the research is the following:

What are the roles and responsibilities of corporations within the Colombian transitional justice context?

In order to find an answer on the central question in this research, various dimensions will be outlined. First, the current frameworks in transitional justice and corporate accountability have to be laid out. The notion of transitional justice will be discussed in order to explore ways in which corporations have intersected with the central elements in transitional justice. Hereafter, the current framework for corporate accountability will be set out as well as the recent developments within this

framework, evidencing a movement towards recognition of corporate human rights obligations. The next section will link both transitional justice and corporate accountability, as various case studies will be addressed to explore past experiences with corporate accountability in transitional justice processes, both via judicial and non-judicial means. In order to uncover the roots of the almost non-existing link between corporate accountability and transitional justice, various case studies with examples of Germany, Liberia, South Africa, Timor-Leste, and Argentina will be dealt with. These case studies will lead to a conclusion on the specifics and complexities of addressing the economic dimension in transitional justice processes and holding corporations accountable for human rights violations within such context. The last section will deal with the Colombian case. Within this research a focus on the case of Colombia is chosen, as it is a compelling case, being the next country making a transition from an internal armed conflict towards peace. Furthermore, as will become clear, a lot of corporations in Colombia have been involved in human rights violations carried out in the internal armed conflict. In light of this, in the last section of this research a conclusion will be formulated and recommendations will be made on the role and responsibilities of corporations within the Colombian transitional justice process will be developed.

As this research addresses a new emerging debate within transitional justice research, it is important to acknowledge some of its limitations. In order to prevent ending up with a broad and vague research, choices have been made to bring focus in the research and make it manageable. Against this background, the choice has been made to conduct the research from a human rights and conflict resolution perspective. As the debates within corporate accountability and transitional justice are also subject to some highly juridical aspects, this research tries to avoid and escape these mere juridical complexities, and uses the Colombian case as a practical angle to establish and underscore the potential and value of linking the areas of transitional justice and corporate accountability. Moreover, when the notion of corporate accountability is mentioned in this research, it is used with regard to corporate accountability for human rights violations in conflict-affected countries. In the end, questions that will remain or arise due to the choices made within this research might leave room for further research to address these issues and broaden the debate.

2 Methodology

This thesis can be seen as the end product of the master program 'Conflicts, Territories and Identities' of the Human Geography Department and the Centre for International Conflict Analysis and Management (CICAM) of Radboud University Nijmegen. The explorative research is build up from knowledge gained through an extensive explorative literature study, including an analysis of reports from various transitional justice processes, several interviews/discussions with experts in the field and an international conference on contemporary issues in Transitional Justice in The Hague. Furthermore, the research is linked to an internship at the Dutch non-governmental organization 'PAX for peace' in Utrecht.

PAX is a peace organization with projects related to human rights and peacebuilding all over the world. In Colombia, PAX is supporting victims of paramilitary violence in their search for truth and reconciliation. It investigates the human rights situation nearby the large coal mines in several mining areas in Colombia. Furthermore, PAX coaches, advises and trains local communities in mining areas, as they are often unaware of their options and their rights. Their objectives are to improve the human security situation, prevent conflicts and ensure local participation in decision-making.

2.1 Qualitative Research

The explorative character of this research is reflected in the qualitative approach that is used throughout the research. As the aim of the research is to develop new theoretical insights within the debate on transitional justice, the use of qualitative methods is essential. The research focuses on establishing a link between transitional justice and corporate accountability, which is almost non-existent in current literature on transitional justice. Therefore, as this explorative study deals with a new emerging trend within the field of transitional justice, a qualitative approach is used to elaborate new insights within this debate. The characteristics of qualitative methods fit well in this kind of research, as it consist of considerable advantages compared to other research methods. Hence, the strengths of qualitative research are that it is useful for describing complex phenomena as well as for in-depth studies into a limited number of cases (Johnson & Christensen, 2008). Furthermore, as stated by Johnson & Christensen (2008), by extensively describing a limited number of cases in-depth, qualitative research is the preferable method to conduct cross-case analysis and comparisons in order to explain new developments and elaborate new theoretical insights. Within the explorative in-depth case study in this research, a limited number of experiences with past transitional justice processes that dealt with corporations are analyzed in order to explore the potential and possibilities for a framework for corporate accountability in the Colombian transitional justice process.

This thesis builds upon the existing concepts of transitional justice and corporate

accountability for human rights violations. Although a link between the two concepts in current literature is almost non-existent, this thesis tries to bridge these concepts. Transitional justice is used as a foundational theory throughout the research for multiple reasons. First, it is an acknowledged concept that has for decades been the basis for countries dealing with the legacy of conflict and war. Furthermore, as more and more experiences of countries dealing with the aftermath of conflict have become known and critically reflected upon, transitional justice is an ever-developing concept that has to continuously adapt to contemporary contexts and new emerging trends. As a result, the focus is upon the link between the concept of corporate accountability for human rights violations. The concept of corporate accountability for human rights violations in itself is not necessarily new, as there have been numerous judicial processes against corporations involved in human rights violations over the past decades. However, the current framework and (non-binding) rules for corporate involvement in human rights violations have only been established by 2011, and are still heavily debated and subject to new developments. As the possibilities for corporate accountability outside the judicial process are largely underexplored, linking it with transitional justice might potentially mutually reinforce both concepts. By extensively describing the basic elements of these concepts and their current debates, similarities and overlap could be found which validate the establishment of a link between both concepts. Altogether, these theories and debates form a comprehensive conceptual framework regarding corporate accountability for human rights violations within transitional justice, that sheds new light on the role and responsibilities of corporations within such transitional justice processes. Hence, by looking at practical experiences of corporate accountability in previous transitional justice processes, best and worst case scenarios can be identified. Via this way, a framework for corporate accountability in the Colombian transitional justice specifics has been established, which unveils advantages and challenges for incorporating roles and responsibilities for corporations in the transitional justice processes.

As the guaranteeing of a variety of data sources is an important aspect of doing qualitative research (Creswell, 2007), the collected data in this research are a combination of the internship at peace organization 'PAX for peace', an extensive in-depth analysis of literature and videos, interviews with experts, group discussions and an international conference on transitional justice. The main concern is to 'triangulate' the collected data from these multiple sources and to establish converging lines of evidence in order to make the findings as robust as possible (Yin, 2004, p. 9). During the research process, various interviews and discussions with experts in the field of transitional justice, corporate accountability, and the Colombian peace process have been conducted. The internship at the Dutch non-governmental organization 'PAX for peace' has been very helpful with this, as it allowed the researcher to use connections with experts in the field. Moreover, during the research, two internship supervisors travelled multiple times to Colombia to provide the newest information

from the field. Furthermore, information gathered at a conference on contemporary issues in transitional justice in The Hague has been used within the research, as well as an in-depth analysis of existing literature and videos on the specific themes. In this way, ensuring multiple sources of data and perspectives on this specific theme has helped to produce a more comprehensive set of findings. Throughout the research process, the existing concepts have been continuously reflected upon. The various sources of data led to the fact that statements and assumptions have been constantly revised throughout the research when new visions and perspectives required to do so.

Although the research has been linked to an internship at 'PAX for peace', it is an independent research that does not necessarily reflect the visions of PAX. Furthermore, in order to guarantee the reliability of the research, possible biases have been taken into account and the position within the debate of the sources used throughout the research have been critically reflected upon to ensure sufficient depth and relevance of data collection and analysis (Noble & Smith, 2015). After all, negative and positive sentiments have been avoided and the use of various sources and perspectives ensures a comprehensive and objective vision on the topic.

3 Theoretical Framework

3.1 Transitional Justice

Armed conflicts and repressive regimes constitute a potential threat to the international community as they have detrimental spill-over effects, such as the commission of massive atrocities, displacement of people, expansion of terrorism, arms production and proliferation, drugs proliferation, organized crime, environmental damage, poverty, and lack of development (Sandoval, 2011). As a result, the field of transitional justice has been developed as a way to assist states that underwent such situations in dealing with the legacy of past atrocities. By doing so, it provides a framework for states to undergo important political and social changes which will eventually enable the establishment of the foundations for a stable and peaceful future. As the UN definition encompasses: “Transitional Justice is 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” (UN, 2010).

Within this debate, it is not the question *if* countries and societies have to deal with the past, rather, it has explored ways of how *best* to deal with this legacy of past atrocities. Hence, despite the fact that transitional justice measures rest on solid legal and moral obligations, there is wide latitude as to how these obligations can be satisfied (ICTJ, 2009). Although the specific characteristics of a transitional justice process might differ from case to case, Collier (2004) stresses the fact that failing to address all causes of conflict and repression in whatever case will most likely lead to a relapse into conflict.

Addressing all causes and consequences of conflict and repression requires considering the role of all actors that caused or contributed to the commission of mass atrocities – even if they are non-state actors, as in the case of corporations (Sandoval et al., 2013). Despite the fact that corporations often operate in countries affected by conflict or repression, and the impact of corporations in human rights violations within such countries becomes more and more publicly known, the involvement and responsibilities of corporations within transitional justice processes are still heavily debated. However, the globalization of transitional justice has led to a shift from a state-centric approach to increasingly discovering the obligations of non-state actors in transitional justice, such as corporations. In order to explore the responsibilities of corporations in the developing and expanding field of transitional justice, it is first necessary to map the elements that are believed to play a crucial role in transitional justice. Later on, the current framework for corporate accountability for human rights violations will be described. By doing so, the academic debate around these elements and the theoretical considerations will come to the fore.

3.1.1 Truth

The first element that is believed to play an essential role within transitional justice processes is *truth*. In the aftermath of armed conflict or periods of internal strife, the right to the truth has often been invoked to help societies understand the underlying causes of conflicts or widespread human rights violations. In order to reconcile, there is an inherent need to clarify what happened and who was responsible for the atrocities committed during conflict and repression. Ban Ki-moon (2011, p. 1), Secretary-General of the United Nations, speaks about the “indispensable role of the truth” in upholding human rights. Firstly, he states that “knowing the truth offers victims and their relatives a way to gain closure, restore their dignity and experience some form of remedy”. Furthermore, he stresses that “exposing the truth helps entire societies to foster accountability for violations”. Herman (1994, p. 1) acknowledges this important role of truth by saying that “remembering and telling the truth about terrible events are prerequisites both for the restorations of the social order and for the healing of individual victims”. Tutu (2004) further states that unearthing the truth and acknowledging it is not only necessary for the victims to heal, but for the perpetrators as well. Guilt, even unacknowledged guilt, has a negative effect on the guilty. In order to create the possibility for a new beginning, one has to go to the roots, remove that which is festering, cleanse and cauterize (Tutu, 2004). However, as Hayner (2011) argues, official truth-seeking is a cumbersome and complicated affair, and the notion of truth within transitional justice is largely subject to questionable and overstated assumptions. How much work can be expected from the truth? Is it always necessary to know the truth in order to achieve reconciliation? In some cases it would, in others it wouldn't, and as hazy a concept as reconciliation can be, it may be more affected by other factors quite apart from knowing or acknowledging the truth about past wrongs (Hayner, 2011). As Parlevliet (1998, p. 2) puts it, truth is so commonly used that “it seems to be a transparent notion, clear to all who are involved or interested in redressing past abuses, but truth, like justice and reconciliation, is an elusive concept that defies rigid definitions”. The complexities of dealing with the notion of truth become visible with the considerations made within transitional justice processes. Within such processes, it is not sufficient to simply establish the truth, as “facts alone will not help to form a shared past” (Forsberg, 2003, p. 73). Rather, the interpretation of the truth is important, and local communities must accept, acknowledge and internalize it in order to envisage how it can play the positive and healing role so often attributed to it (Clark, 2011). Lessons from earlier experiences in truth commissions show that contested and unacknowledged truth through various forms of denial is a factor that can seriously impede the progress of a transitional justice process¹. Moreover, as truth is a far more complex concept than transitional justice literature often seems to imply, Clark

¹ Look for example at Serbs who continue to insist that what happened in Srebrenica was not genocide, and avoiding the word in its official apology, on <http://www.theguardian.com/world/2010/mar/31/serbians-sorry->

(2011) further notes that important issues also arise regarding the comprehensiveness of truth established in a transitional justice process. First, the truth that trials and truth commissions are able to document largely depends upon how much the victims and perpetrators are actually willing and able to reveal the truth (Clark, 2011, p. 250). Therefore, the cooperation of such trials and commissions with victims and perpetrators is of great importance for the effectiveness of the transitional justice process. Second, politics is a factor that is necessarily intertwined with transitional justice and may have a significant impact on the comprehensiveness of the established truth in transitional justice processes (Clark, 2011, p. 250). As the political situation of countries in transition is often fragile and sensitive, the search for acceptable truths would in some cases be logically more desirable than the search for complete truths². Third, resource constraints may affect the breadth and depth of truths that trials and truth commissions are able to establish (Clark, 2011, p. 251). Hayner (1996) stresses this by noting that a truth commission is a temporary body with limited resources, which must select the most important or representative cases for in-depth study, after which patterns of abuse can be outlined. Therefore, it would be unrealistic to expect a commission to document the complete truth about all violations. All these factors sum up the complexities of truth-seeking efforts in transitional justice processes. Although this often seems to be a very difficult and maybe even unsatisfactory task, the desire for the truth is powerful and seemingly almost universal, as the creation of new truth commissions all over the world has been fairly steady over the last decade.

The need for truth finds its support in international law, and it has emerged as a legal concept in various jurisdictions. The origins of the right to truth can be found in art. 32, 33 and 34 of Protocol I to the Geneva Conventions, which recognizes that families of missing persons have the right to know the fate of their relatives, and it establishes the obligations to be fulfilled by each party to the conflict in this respect (International Committee of the Red Cross, 1977). The right to truth is further established by various international institutions, in particular, the Inter-American Commission on Human Rights and Court of Human Rights, the UN Working Group on Enforced or Involuntary Disappearances and the UN Human Rights Committee. These agencies drew upon this right to truth and expanded it beyond information about events related to missing or disappeared persons, to include the truth, progress and result of the investigation and the fate of victims in other serious human rights violations and the context in which they occurred. The Inter-American Court on Human Rights for example, has upheld the right to truth for victims, their next of kin and society as a whole in a series of cases. Statements within these cases determined that the state is obliged to provide the families of the victims with the truth about circumstances surrounding crimes (Inter-American Court

² An example is given within the South African Truth and Reconciliation Commission, which arrived at acceptable truths, in Henderson (2000).

of Human Rights, 1988). Furthermore, it was stated that society has the right to know the truth regarding crimes in order to be able to prevent them in the future, and therefore the outcome of all proceedings have to be revealed to the public (Inter-American Court of Human Rights, 2003). In the Barrios Altos Case in 2001, the court adopted the statement that amnesty laws impeding the investigation of the facts about gross human rights violations are not permitted under international human rights law (Inter-American Court of Human Rights, 2001). In addition to the statements of regional human rights courts, the right to truth is also affirmed and seen as a fundamental right by statements of several national courts. The Constitutional Court of South Africa (2011) for example considered truth telling as “one of the moral bases for the transition from the injustices of the apartheid system to democracy and constitutionalism”. In Colombia, the priority for the demobilization of illegal armed groups did not reduce the state’s obligation to seek the truth regarding the disappeared (Constitutional Court of Colombia, 2006). Thus, the right to truth can be seen as a concept that is widely recognized within transitional justice, and also its enforceability is confirmed within jurisdictions of national and regional courts (González & Varney, 2013).

The right to truth can be pursued by the use of both judicial and non-judicial means. When it comes to judicial proceedings, criminal trials are an important mechanism to investigate facts about past human rights violations and to establish an account of the truth. However, while criminal trials can certainly be used to establish facts, González & Varney (2013) also acknowledge certain unavoidable limitations to the judicial establishment of the truth. Countries in transition are often subject to a precarious political situation and civil unrest, which may ultimately lead to judiciaries being temporarily unable to hold effective trials, or such trials may be limited to the most notorious cases, leaving many victims neglected. Another negative dimension of establishing facts by judicial means, is that it may be inadequate to acknowledge the personal, cultural or psychological experiences of victims (González & Varney, 2013). Therefore, in the ideal situation, transitional justice provides judicial as well as non-judicial means for establishing facts in truth-finding efforts. The most important non-judicial commissions of inquiry during the last decades of transitional justice experiences have been truth commissions.

Truth commissions, aside from judicial proceedings, have become common mechanisms in order to enforce the right to know the truth in post-conflict policy. A truth commission is a commission of inquiry created by the state, in order to investigate heinous crimes committed during conflict or repression and to produce recommendations for dealing with the consequences (Freeman, 2006). In doing so, these mechanisms can achieve a more comprehensive reconstruction of the past than can be achieved judicially. There are good reasons to believe that truth commissions can contribute to rebuilding a society torn apart by violent conflict. González (2014) for example, argues that conflicts which aren’t seriously examined persist in the form of polarized memories and

strategic lies that can feed mistrust, humiliation, and new cycles of violence. Truth commissions, therefore, shine light on the facts of past violations with rigor and impartiality, and give diverse groups the opportunity to tell their stories. In this way, it is able to restore victims' rights and a sense of trust among citizens, and it reduces the possibility of manipulation and hateful narratives. Furthermore, by interpreting the historical context of the conflict, it can identify the factors that drove the conflict, and create a historical account of what happened, which violations took place, who was responsible and how a society has reached that situation (González, 2014). Lastly, it provides a respectful and safe space for testimonials, enabling victims to heal and former combatants to reintegrate into society (González, 2014). Thus, when implemented in the right way, truth commissions can be important instruments for the redress of gross violations of human rights (De Greiff, 2013).

As noted earlier, the appeal of truth commissions has not waned, but has been steadily growing in the last decades. Despite this emerging trend, truth commissions face serious challenges, which are not limited to post-conflict situations. The UN Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-repetition, Pablo De Greiff, in 2013 already emphasized the fact that the mandates and functions of truth commissions have suffered significant expansion. Commissions are expected to address a significantly broader array of violations, occurring over longer periods of time, in more complex settings (De Greiff, 2013). Furthermore, whereas commissions used to concentrate on fact-finding and victim tracing, they are now expected to provide a comprehensive analysis of all-encompassing contexts and underlying causes and to generate structural reform proposals (De Greiff, 2013). Another emerging trend is that the mandates of truth commissions identify reconciliation more prominently as a goal than establishing the truth. However, truth commissions have to beware of aiming for reconciliation, as it often oversteps its limits and leads commissions into territory where they may neglect the rights of victims (ICTJ & KAF, 2014). Also, societies may mistakenly expect that the country will be reconciled when the work of the truth commission is done. As De Greiff (2013) states, truth commissions derive their power to a large extent from the moral authority and the expertise of commissioners. Hence, the selection of capable and independent commissioners and staff is crucial to their success. Another factor that is particularly important to the work of truth commissions is the need for serious political analysis to fit the local contexts (ICTJ & KAF, 2014). As truth commissions are temporary bodies, the responsibility of the implementation of its recommendations lies primarily with the state. To improve the likelihood that their recommendations will be implemented, efforts should concentrate on increasing the accountability of governments, strengthening their capability to frame recommendations in actionable terms and establishing reliable and accessible archives (De Greiff, 2013). As has become clear, the work of truth commissions is a particularly important and complex affair. Some level of

disappointment is therefore not uncommon, as the expansion of the mandates and functions of truth commissions can give rise to an imbalance between what truth commissions are expected to accomplish and the powers and resources they are allocated (Hayner, 2011 ; ICTJ & KAF, 2014).

3.1.2 Justice

The second element is *justice*. Next to the establishment of the truth, the provision of justice is a central element within transitional justice theory and practice. A key belief within transitional justice is that alleged perpetrators of human rights violations should be prosecuted, tried and, if found guilty, punished for the atrocities they have committed. Solzhenitsyn (1974, p. 178) already emphasized the argument for justice by saying that “when we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations”. As Sandoval et al. (2013) argue, the support of this justice process comes from three main arguments: the international law paradigm obliges states to investigate, prosecute, and punish such crimes; adequate reparations under international law include holding perpetrators to account; accountability for past crimes is crucial to preventing such atrocities in the future. Hence, the justice process can be seen as an overarching element that shows the connectedness between the various elements of transitional justice, as the justice process is linked to an account of truth, reparations and guarantees of non-recurrence. Within the current debates, the demands for justice are still noticeably at the heart of the transitional justice paradigm. As a group of independent UN human rights experts emphasize, the fight against impunity is still very present and has to be addressed with transparency and accountability for all state and non-state actors (De Zayas et al., 2013).

Important developments taking place simultaneously in international courts, foreign courts, and domestic courts, mark a new trend that supports the need of the fight against impunity. Domestic trials are taking place in countries such as Argentina, Colombia and Chile, which are not only a response to victims’ demands for protecting and enforcing their rights, but also to comply with what are considered to be binding international obligations. Orentlicher (1991) concludes for example that although comprehensive human rights conventions, such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, do not explicitly draft such an obligation, all of these conventions include the right to an effective remedy before a competent body, and authoritative interpretations make clear that these treaties require states to investigate serious violations of human rights and bring to justice those who are responsible. The key legal precedent for this particular approach lies with the judgment of the Inter-American Court on Human Rights in the Velásquez Rodríguez v Honduras case, in which it was decided that “states must

prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible to attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation" (Inter-American Court on Human Rights, 1988). Considerations like this laid the foundation for a new trend in world politics toward accountability for past human rights violations, which has been called the justice cascade by Lutz & Sikkink (2001).

The justice cascade can be seen as a rapid shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions, such as trials, on behalf of those norms (Sikkink, 2011). The emergence of this trend arises from decades of efforts for greater accountability for past human rights violations, in which largely three different models for accountability have been used: the impunity model, the state accountability model and the individual criminal accountability model. Under the impunity model, state officials were protected from any legal accountability for past human rights violations. Historically, this has by far been the most common model as it was the norm prior to the 1970s. The establishment of the Nuremberg tribunals after World War II has been the exception to this norm and can be seen as the beginning of the justice cascade. As Sikkink & Kim (2013) state, the Nuremberg tribunals were in many ways the exception that proved the rule: only in cases of complete defeat in war, was it possible to hold state perpetrators criminally accountable for human rights violations. After World War II, new human rights treaties that were drafted by states marked the shift towards a state accountability model, in which the state as a whole was held accountable for human rights violations and was expected to provide remedy. However, under this model, state officials themselves had still been immune from prosecution for human rights violations. The establishment of ad hoc tribunals by the UN Security Council to deal with the atrocities committed in the former Yugoslavia and Rwanda (The International Criminal Tribunal for the Former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994) can be seen as the first time since Nuremberg that states returned to using the individual criminal accountability model at the international level. Furthermore, the International Criminal Court (ICC) has entered into force in 2002, after the agreement in the Rome Statute. The ICC is granted jurisdiction over individuals who committed any of the following international crimes: crimes against humanity, war crimes, genocide, and aggression. Also, during the last decades, hybrid tribunals have been established, such as the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber in the Court of Bosnia and Herzegovina, the Crime Panels of the District Court of Dili in Timor-Leste, and the Special Court for Sierra Leone. These developments show the major increase in individual criminal accountability on the domestic, transnational and international level which is referred to as the justice cascade. Within this relatively new comprehensive accountability system, domestic courts have priority and the international courts, such as ICC, are backup institutions which can exercise jurisdiction if domestic courts are

unwilling or unable to prosecute (Schabass, 2001). Orentlicher (1991, p. 2562) calls this “domestic enforcement with an allowance for ‘fallback’ international jurisdiction”, whereas Roht-Arriaza (2005, p. 200) states that foreign trials are a “back-stop” for domestic justice. Thus, the justice cascade shows the international trend towards fighting impunity and it resulted in a system in which states that fail to fulfill their international obligation to hold the perpetrators of human rights violations to account in their own jurisdictions, could be backed by the international community who can take action to ensure that justice is achieved.

Within transitional justice literature, various approaches to justice can be distinguished. Retributive justice is a retrospective approach which justifies reasonable and proportionate punishment as a response to fit the relative severity of past wrongdoings or injustices. The central idea is that the offender has gained unfair advantages through specific behavior, and that punishment will set this imbalance straight (Maiese, 2003). In this way, the claim is made that retributive justice dissipates the call for revenge and contributes to reconciliation (Clark, 2009). Hence, retributive justice plays a central role in courts, trials and legal proceedings, just as the Nurnberg Military Tribunal, the ad hoc tribunals and hybrid courts which dealt with the legacies of past human rights violations in various transitional countries. However, a strictly retributive approach towards justice is often criticized for being too backward-looking and its mere focus on perpetrators, putting the needs of victims in second place and making truth less easily disclosed (Andrieu, 2010). Moreover, Clark (2009) argues that criminal trials are a fundamental and necessary starting point for addressing the legacy of human rights violations, but they are not enough by themselves. Retributive justice should therefore, as suggested by Boraine (2006), be complemented with restorative justice.

From the restorative perspective, retributive punishment is seen as insufficient for reestablishing a peaceful social coexistence, for it does not give primary importance to the victims’ suffering and needs, nor does it allow for the adequate reincorporation of the delinquent in the community (Uprimny & Saffon, 2006). Restorative justice is grounded in the belief that crimes and wrongdoings are offences against individuals within a community, rather than against the state (Price, 2000). Furthermore, as Sherman and Strang (2007) state, the restorative approach fosters dialogue between victims, perpetrators, and their respective communities, which leads to the highest rates of victim satisfaction and offender accountability. The aim of restorative justice is to strengthen the community and to prevent similar harms from happening in the future by stressing the social importance of reconciliation between victims and perpetrators. Truth commissions are seen as the most important tools for establishing restorative justice. The founding moment of such commissions which fully focused on restorative justice was the establishment of the South African Truth and Reconciliation Commission in 1996. Restorative justice often finds itself in a paradoxical situation, where on the one hand it must satisfy the public need for the exposure of the wrongdoing, but on

the other hand it must ensure the fair treatment of those accused of wrongdoing (Andrieu, 2010). This paradox is further reflected in the 'peace versus justice' debate that often excludes one at the expense of the other. Demands for justice and legal accountability can be an obstacle to peace, since peace accords may involve compromises and amnesties with war criminals and human rights perpetrators (Merkel, 2014). This makes it problematic to either choose for a retributive or restorative approach to justice. Keller (2008) calls this 'peace versus justice' debate a "false dichotomy", as both objectives aren't exclusive, but in fact mutually reinforcing goals of any sustainable effort to address legacies of mass violence and repression (Hodzic, 2011). Rather than choosing for one of the approaches, it is important to balance the needs for both approaches and let them fit to the local context.

A justice process is very much related to social and political processes nationally, moving a country from authoritarian rule or armed conflict into a peaceful society. Therefore, a third approach to this process is distributive justice, which focuses on structural factors of social injustice and the promotion of democratic transformations (Bergsmo et al., 2010). The argument in this approach is building on the notions that social structural factors, such as the distribution of wealth and land, have been at the root of many internal armed conflicts. Furthermore, transitions have often been transformative constitutional moments for political communities, and as such, they are an occasion for publicly addressing fundamental issues as poverty alleviation, wealth distribution, land reform and paths to economic growth (Bergsmo et al., 2010).

Transitional justice offers a situation in which sustainable peace can be established by the use of legal and non-legal means. Rather than choosing a retributive, restorative, or distributive approach, it is important to balance between the various approaches to justice and make them fit in the local context of the country in transition to establish durable peace. As Andrieu (2010) argues, any unilateral assessment on the past or attempt to sweep up historical debates through law can result in a miscarriage of justice. Furthermore, any unilateral reading of the conflict runs the risk of artificially dividing the society into 'victims' and 'perpetrators', whereas the dynamics of past violence are actually much more complex (Levi, 1989). Therefore, it is important to carefully balance the approaches towards justice in order to fit the needs of the specific context and effectively lay the foundations for reconciliation and durable peace.

3.1.3 Reparations

The third element is a *reparation* process. Another assumption on which transitional justice is based, is that human rights violations cause serious harm to its victims and should therefore be redressed (Sandoval, 2011). This assumption is widely upheld within the legal system, via the right to reparation. The right to reparation is primarily a right against the state under international human

rights law, against state and non-state actors under international humanitarian law, and against individual perpetrators under international criminal law. This right stresses that any actor, whether state or non-state, who caused harm should redress it, even in periods of transition. The duty to provide reparations is further grounded in the statement that after the occurrence of human rights violations, those who committed serious harm to victims should provide redress. Van Boven (2010) further emphasizes that although the duty to provide redress and reparation is referred to in case of *gross* violations of human rights, it is entailed by *all* violations of human rights. The harm suffered by victims needs to be addressed in order to be able, as a society, to move forward and deal with the past. Providing reparations is, in this way, related to guarantees of non-repetition.

Reparations can be expressed in various ways, and the term is used in different contexts. Within the juridical context, in particular the context of international law, victims have a right to reparation. Here, the term is used to refer to all those measures that may be employed to redress various types of harms that victims may have suffered as a consequence of certain crimes. From this perspective, reparations can include:

- *Restitution*, which can range from the restoration of rights such as liberty and citizenship, to the reinstatement of jobs and benefits, to the restitution of property.
- *Compensation*, which refers to measures that seek to redress the harms suffered through the quantification of harms. Merely financial compensation will always be viewed as unsatisfactory and inadequate. It is doubtful whether or not it will significantly affect the quality of life of the victims. Furthermore, if the compensation is not made within a comprehensive framework of reparations, it lacks an acknowledgement towards the victims and it may be viewed as a way to 'buy' the silence and acquiescence of the victims (De Greiff, 2006b).
- *Rehabilitation*, which includes measures that provide social, medical, and psychological care, as well as legal services.
- *Satisfaction*, which is a broad category that refers to the truth finding process, as it includes the verification of facts, full public disclosure of the truth, searching for, identifying and turning over the remains of dead and disappeared persons, official apologies and judicial rulings that establish the dignity and reputation of the victim.

Another context in which the term reparation is used, is with regard to the design of programs for massive coverage. Examples of such reparation programs can be found in Germany, Chile, Peru and Argentina (Correa, 2011; Heinelt, 2010).

According to the UN General Assembly (2005), reparations should be adequate, effective, and prompt. With this in mind, De Greiff (2006b) uses a narrower sense of the term reparations, as

he refers to measures that provide benefits to victims directly. In addition to the material measures, which have already been explained, there are also symbolic reparations. These kind of reparations include individual redress measures (personal letters of apology, proper burial for victims, copies of truth commission reports), as well as collective measures (public acts of atonement, commemorative days, establishment of museums). In principle, there is no conflict between material and symbolic reparations. Ideally, they can lend mutual support to each other, which is especially important in contexts characterized by scarce resources, where symbolic reparations will surely play a particularly visible role (De Greiff, 2006b). Furthermore, there is no conflict between individual and collective measures. After all, carrying out reparations should always be based on the needs and satisfaction of the victims of human rights violations, as the primary aim of reparation measures is to seek the reestablishment of the victims' status quo ante. In contexts where a country is going through a transition from repression or conflict towards democracy, this reference point seems to be insufficient, as can be seen for example in the lengthy internal armed conflict in Colombia. It is because of this, that the transformative potential of reparations has to be explored in order to deal with social and economic inequalities that were already part of society and played a role in the conflict. Within this regard, it is important that the 'right of victims' are guaranteed within transitional justice.

Reparations may occupy a special place in a transition out of conflict from the perspective of victims. For some victims, reparations are the most tangible manifestation of the efforts of states to remedy the harms they have suffered. De Greiff (2006a) points to the fact that criminal justice – even if it were completely successful both in terms of the number of perpetrators accused (far from being the case in any transition) and in terms of results (affected by the availability of evidence, and by the persistent weaknesses of judicial systems, among other factors) – is, in the end, a struggle *against perpetrators* rather than an effort *on behalf of victims*. Reparations, on the other hand, are arguably the most victim-centered of the various approaches to fighting impunity. However, as Carranza (2009) states, most of the international resources meant for transitional justice have gone to operating war crime tribunals, occasionally to truth commissions, certainly to reintegrating ex-combatants, but seldom, if ever, to directly benefit victims of human rights violations. After all, understanding victims' priorities and perceptions of justice requires extensive consultation and participation of victims in defining, designing and implementing a reparations process (Walker, 2015).

In addition to the fact that reparations are used to remedy the harm experienced by victims of human rights violations, they have also a political function. Walker (2015) notes that reparations are often seen as a part of a transitional project that signals and models a break with the past political order and a commitment to a different schedule of moral and political values. These rights

include for example respect for individuals' rights and equality as citizens, institutionalized transparency and accountability, and the rule of law. Furthermore, as Firchow & Mac Ginty (2013) state: the success or failure of reparations programs often depends on "optics" and "acoustics", which they describe as how such programs are managed and perceived. Hence, besides its political function, reparation measures contain an essential expressive or communicative function. Walker (2015) emphasizes that part of what makes reparations effective is what reparations demonstrate and communicate to victims and to their societies about the recognition of wrong, responsibility and the standing of victims as rights. Bevernage (2012) points out that the communicative and expressive function of reparations explain why material measures alone are insufficient and that they require a certain framing to be acceptable. Thus, reparations have a far broader function than only providing something of concrete use and fitting value. By carrying out reparations, it is also intended to 'say' something definitively to victims and their society about why this performance is owed specifically to victims as a matter of justice.

Ideally, reparations succeed in the full respect and recognition of those whose rights and humanity have been disregarded. However, reparations alone are not sufficient to secure the civic and human respect, equality, inclusion and accountability under the rule of law that is at the heart of transitional justice (Walker, 2015). Magarrell (2007) further points out that reparations are made significantly more effective when linked to other, complimentary initiatives, such as truth-seeking, institutional reform and accountability mechanisms. This is why reparations are closely linked to the other elements of transitional justice. Reparation without steps to ascertain the truth about past violations may be perceived as an effort to 'buy' the victims' silence, which may not only offend victims but also allows denial to flourish. Likewise, reparations without the efforts of institutional reform and further measures to prevent the recurrence of abuses would be meaningless. Without accountability measures to hold accountable perpetrators of human rights, victims are effectively asked to trade their right to justice in order to receive the support that is also their due. Magarrell (2007) further stresses the importance of reparations within the comprehensive approach of transitional justice. In contrast to the other transitional justice measures, reparation programs provide a direct focus on victims' needs, along with tangible measures of acknowledgement and recognition. Via this way, reparations have the potential to build trust and restore dignity through a felt, public commitment to human rights (Magarrell, 2007).

3.1.4 Institutional Reform

The last element contains a process of *institutional reform*. States in processes of transition must deal not only with the atrocities that were committed in the past, but it should also deal with the structures that made these violations of human rights possible. Without the reform of institutions,

transitional justice would be unable to prevent heinous crimes and human rights violations from occurring again in the future, as the structures that made the violations possible would continue to exist. The institutional reform process is therefore directed to the future, towards reforming institutions in order to provide guarantees of non-repetition. In particular, but not exclusively, the institutional reform process is focused on the transformation of the security sector and the justice sector. As outlined by the UN General Assembly (2005), the following measures are believed to play an important role in the institutional reform process:

- Ensuring effective civilian control of military and security forces and disbanding armed actors;
- Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- Strengthening the independence of the judiciary;
- Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

With regard to corporations, legislative reform is particularly relevant, as the business sector should be required to do the same. A lack of legal regulation of the work within the business sector would only facilitate the commission of abuses and it further engages the international responsibility of the state, as it fails to take the necessary measures to make sure that people can enjoy the rights protected under international law (Sandoval et al., 2013). Of all transitional justice measures,

institutional reform is one of the most needed measures to stop businesses from feeling that they have certain immunities that protect them. Only when this measure is effectively addressed, the non-recurrence of heinous crimes and human rights violations can be established and the 'culture of impunity' can be broken (De Greiff, 2015).

As a transitional justice measure, the reform of institutions is established in order to acknowledge victims as citizens and rights holder and to build trust between all citizens and their public institutions. Within this process, the act of vetting takes on an important role. Vetting entails the assessing of an individual's integrity in order to determine the suitability of the specific person for public employment (Duthie, 2007). Integrity is used in this context, as outlined by Mayer-Rieckh (2006), for a person's adherence to relevant standards of human rights and professional conduct, including her or his financial propriety. When personnel do not meet the standards, they are eliminated from public service or sanctioned. De Greiff (in Mayer-Rieckh, 2006) emphasizes that vetting can pursue plural ends. Among others, vetting can have punitive and preventive potential, it can facilitate other transitional processes, it can promote civic trust, and it can help in providing recognition to victims of violence and repression. By doing so, vetting is an important aspect of combating impunity for perpetrators of human rights violations.

Altogether, the institutional reform process can be seen as restructuring and reviewing state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents. Just as the other transitional justice measures, its effectiveness can be enhanced when integrated in a comprehensive transitional justice policy, which includes policy that ensures the coordination of all transitional justice elements that are believed to play a key role in such a process.

Processes of truth, justice, reparations and institutional reform are believed to be the essential elements within transitional justice processes. As described, all of these elements can take on various kinds of shapes and modes of implementation. What is the key task here, is to align these various elements so that they are compatible with each other and simultaneously fit the local context.

Orentlicher already emphasized this by stating that:

"If the passage of time has reinforced the need for a comprehensive approach in addressing systemic abuses of the past in which various measures – among them truth commissions; trials; institutional, social and economic reforms; and reparation programs – play a distinct and unique part, it has also underscored the interdependence of these measures: to a considerable degree, the effectiveness of each of these measures turns upon the broader context in which it unfolds, including its relationship with other dimensions of transitional justice" (Orentlicher, 2007, p. 16).

Besides the importance of coordinating the different elements of transitional justice in a proper way so as to ascertain their effectiveness and compatibility, they can be, and in the most desirable situations they are, mutually reinforcing. On the one hand, some legal pressure (trials and prosecutions) is needed to enable dialogue between victims and perpetrators, and establish the possibility for an agreement outside the judicial process (truth commissions). On the other hand, a toothless mechanism outside the judicial process should always have a legal alternative for reconciliation, and an option to fall back on if the parties don't succeed in reaching an agreement outside the judicial process. Furthermore, it is important to show the parties in a conflict that all the steps in the transitional justice process are made within a comprehensive framework with the final goal of overcoming conflicting issues which has made it impossible for the parties to live in a peaceful society. In the end, such a situation is most conveniently for all parties. In order to achieve this, it is important that public measures are taken that institutionalize the government's commitment to fundamental rights.

3.2 Towards corporate responsibilities in transitional justice

While transitional justice principles until now have largely been designed to address state duties, progressive developments are increasingly including non-state actors as possible human rights violators. For example, the role of corporations and their alleged involvement in human rights violations becomes increasingly the object of scrutiny, as more often information about such issues becomes publicly known. Although the UN Guiding Principles on Business and Human Rights have been designed to address the duties of corporations, they still have a non-binding character and don't impose any obligations toward these actors. By the design of the UNGPs, it was generally felt that corporations are to be held responsible for their policies and practices, allowing victims to seek redress and reparation on the basis of legal liability and human solidarity (Van Boven, 2010). However, until now, international practice seems to suggest that corporations are not to be held accountable for their role in human rights violations. As Sandoval et al. (2013) put it, this can partly be explained by the general perception that prosecutions could be an obstacle to peace, truth, and reconciliation in the aftermath of conflict. Supporters of this idea believe that peace must be sought first in order to allow a society to move forward. As countries in transition are often in a state of economic collapse, a trade-off can be observed within transitional justice processes (Carranza, 2008). In exchange for their contributions to a country's economic recovery, corporations in transitional justice settings are not prosecuted. However, as Kremnitzer (2010) argues, the direct prosecution of corporations is crucial to dismantle the economic structures that make these human rights violations possible and to prevent such situations from recurring in the future. As the importance of addressing non-state actors, such as corporations, has been gradually acknowledged in current transitional

justice research, it is first and foremost essential to explore the current framework and theories of corporate accountability. After this, international practice with regard to corporate accountability in transitional justice settings will be examined, so that possible lacunae between theory and practice can be identified and addressed.

3.3 The current framework for corporate accountability

There is still no explicit legal rule under public international law or any of its branches stating that corporations can be held responsible for human rights violations by action or omission and that as a consequence they have the obligation to provide prompt, adequate and effective reparation for victims. However, in the past, several international guidelines have been elaborated in order to persuade corporations to take responsibility for the social, ecological and/or economic consequences of their activities. Among these are the OECD Guidelines for Multinational Enterprises, the ISO 26000 Guidance on Social Responsibility and the United Nations Global Compact³. Whereas the UN Global Compact and the ISO 26000 Guidance focus on the sustainability and social responsibility of corporations' policies and practices, the OECD guidelines have been providing recommendations adhering governments to conduct responsible business. Over the years, some of these regulations have undergone various updates to match the changing international business context. In June 2011, with the unanimous endorsement of the UN Guiding Principles for Business and Human Rights (UNGPs), the focus shifted towards the business conduct of corporations with respect to human rights. As a result, the UNGPs have been established as an authoritative global standard on the respective roles of businesses and governments in helping ensure that companies respect human rights in their own operations and through their business relationships. In this way, the UNGPs provide an important reference framework that permits the assertion that corporations should provide redress to their victims when their activities are related to human rights violations. Recent work concerning Human Rights & Business, including the establishment of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, can further be seen as a recognition of the importance of binding rules for corporate accountability regarding human rights abuses. Although this is a step in the right direction, the lack of binding rules still permits loopholes that provide impunity for corporate human rights abuses and leaves the victims of such violations without redress. This is something that is especially crucial for transitional justice settings, in which accountability for all actors involved in the conflict and redress for all victims of the conflict are seen as central elements in order to achieve reconciliation and durable peace.

³ For more information about these regulations: visit <http://www.oecd.org/corporate/mne/48004323.pdf> for the latest version of the OECD Guidelines, <https://www.unglobalcompact.org/what-is-gc/mission/principles> for the UN Global Compact and http://www.iso.org/iso/ru/iso_26000_project_overview.pdf for a project overview of ISO 26000

3.3.1 UN Guiding Principles on Business and Human Rights

The debate concerning the responsibilities of business in relation to human rights became prominent in the 1990s, when the impact of oil, gas and mining companies increased and they expanded their activities towards increasingly difficult areas. As a consequence, the UN Secretary-General appointed a Special Representative with the aim of clarifying the roles and responsibilities of states, corporations and other social actors in the business and human right sphere. Eventually, in June 2008, Special Representative John Ruggie presented the “Protect, Respect and Remedy” Framework as a reference for the clarification of the relevant actors’ responsibilities and a foundation on which thinking and action could be built over time. The implementation of this framework was completed in 2011, when the UN Guiding Principles on Business and Human Rights were endorsed by the UN Human Rights Council. Until now, the UNGPs form the dominant reference framework for the role and responsibilities of corporations with regard to human rights. Moreover, the endorsement of these regulations certainly stimulated debates on business and human rights and it has given it a higher profile. Although issues of transitional justice were not specifically covered within the mandate of the Special Representative, business activities in conflict zones have also been addressed. Hence, several concepts within the framework are informative for a discussion on the link between corporate accountability and transitional justice. Therefore, this section will critically evaluate the UNGPs in order to explore the ways in which corporations can be held accountable for human rights violations within a transitional justice context.

Before describing particular aspects of the UN Guiding Principles, it is important to note that they are applicable to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. Also, they shouldn’t be understood as creating new international law obligations, so they are non-binding recommendations.

The UN “Protect, Respect and Remedy” Framework rests on three pillars (Ruggie, 2011):

- 1) The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;
- 2) The corporate responsibility to respect human rights, which means to act with due diligence in order to avoid infringing on the rights of others and to address adverse impacts that occur;
- 3) Greater access by victims to effective remedy, both judicial and non-judicial.

It may be clear that all three pillars are necessary in order to deal with business-related human rights violations. However, within this thesis, the focus is on the second and third pillar, in order to explore the possible ways to hold corporations accountable and provide redress for victims within this framework.

With regard to the corporate responsibility to respect human rights, it is important to explain its central components. As Ruggie states, in armed conflict the international humanitarian law

standards apply to corporations as well as to others. Human rights are relevant to corporations, as their actions can affect the enjoyment of human rights by others, either positively or negatively. For example, corporations can affect the human rights of their employees, customers, the workers in their supply chain, or, what is especially relevant for corporations operating in conflict zones, the communities around their operations (OHCHR, 2012, p. 9-11). The UNGPs state that corporations should act with 'due diligence' in order to avoid infringements of the rights of others. Due diligence, within this regard, can be understood as "such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent enterprise under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case" (OHCHR, 2012, p. 6). It is an ongoing management process to meet its responsibility to respect human rights in light of the specific circumstances, including operating context, sector, size and similar factors. The remark of avoiding infringement on the human rights of others, means that enterprises can go about their activities, within the law, so long as they do not cause harm to individuals' human rights in the process.

Corporations can be involved in human rights violations in multiple ways (OHCHR, 2012, p. 15). It may cause the impact through its own activities, from which a direct link can be made between the activities of the corporation and the affected person. Otherwise, it may contribute to the impact through its own activities, either directly or through some third party. Lastly, it may neither cause nor contribute to the impact, but it is linked to the entity that caused the impact by a business relationship and a linkage via its own operations, products or services. Thus, even when human rights violations are not directly carried out by a specific corporation, a linkage to the entity that caused them via its operations, product, or services can be seen as the infringement of its responsibility to respect human rights. This is important for corporations operating in conflict zones, as they have to make sure that their operations, products or services are not being used in human rights violations by any of the warring factions. Recognizing that corporations are rarely the principal perpetrators of human rights violations, Ruggie suggests that the criminal law concept of 'complicity' may help to define legal culpability. Complicity captures culpability by virtue of their contribution to, or acquiescence in, human rights violations by others, including employees, private security firms, government agents (for example police, intelligence or military) or non-governmental groups (for example rebel groups and paramilitary organizations) (Binnie, 2009). Ruggie further suggests that the corporate responsibility to respect human rights also applies for silent complicity. A corporation is involved in silent complicity, when the company's silence amounted a substantial contribution to the crime, such as knowingly legitimizing or encouraging the crime (OHCHR, 2012, p. 31-32). The knowledge requirement, within this regard, can be established through direct and indirect circumstantial evidence. Therefore, objective facts and constructive knowledge could be inferred to

establish the knowledge requirement in corporate silent complicity. This is especially important when looking at the work of Truth Commissions.

In order to fulfill their responsibility to respect human rights, corporations should meet the following standards. The corporation should delineate a policy commitment to meet their responsibility to respect human rights. Furthermore, it must adopt a due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. Lastly, it has to provide processes to enable remediation of any adverse human rights impacts they cause or which they contribute (OHCHR, 2012, p. 23). What is especially relevant with regard to transitional justice processes, is that this responsibility to respect human rights applies to actual and potential human rights impact. In the UNGPs, an actual human rights impact is defined as “an adverse impact that has already occurred or is occurring” (OHCHR, 2012, p. 5). From this, it can be derived that the UNGPs don't exclude the corporate responsibility to respect human rights for past human rights violations. The recommendation of acting with due diligence and providing remediation for victims thus also applies for corporate involvement of human rights violations in the past. From a transitional justice perspective, this means that corporations should play an active role in a transitional justice process if they have been involved in human rights abuses that occurred within the armed conflict.

According to the UNGPs, when a corporation contributes or may contribute to an adverse human rights impact, it should take action to prevent the contribution, and also use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage, within this context, refers to the ability to effect change in the wrongful practices of the party that is causing or contributing to the impact. Corporations, within this regard, are thus expected to use their leverage if the harm being done can be linked to the corporation's activities. If corporations can't meet the standards for their responsibility to respect human rights, they should, consider ending the relationship with a contractor or subcontractor if this does not lead to further exacerbation of human rights abuses (OHCHR, 2012, p. 48).

Whereas due diligence aims to prevent and mitigate human rights impact in which a corporation is or might be involved, remediation aims to put right any actual human rights impact that a corporation causes or contributes to. The third pillar of the foundational principles for the UN Framework includes greater access for victims to effective remedy. Remedy, according to the UNGPs, may include apologies, restitution, rehabilitation, financial or non-financial compensation, (criminal or administrative) punitive sanctions, as well as the prevention of harm, through injunction of guarantees of non-repetition (OHCHR, 2011, p. 27). Effective remedy has to be provided by grievance mechanisms, which can either be state-based or non-state based, and judicial or non-judicial.

State-based judicial grievance mechanisms should be implemented by states in order to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human-

rights abuses, including considering ways of reducing legal, practical and other relevant barriers that could lead to a denial of access to remedy (OHCHR, 2011, p. 28-30). States should therefore ensure that the provision of justice is not prevented by corruption and that courts are independent of economic and political pressures. This is an essential, though lacking point within transitional justice contexts, as will be further explained in the next paragraph, because economic pressures are often blocking the road to justice for the victims of corporate human rights abuses.

State-based non-judicial grievance mechanisms should be provided, alongside the judicial mechanisms, to have a comprehensive state-based system for the remedy of business-related human rights abuse (OHCHR, 2011, p. 30). Judicial remedy alone cannot carry the burden of all alleged abuses. Moreover, it is not always required, nor is it always the preferred approach for all claimants. Within the context of transitional justice, truth commissions can play an important role as a non-judicial grievance mechanisms for providing effective remedy. Again, any imbalances between the involved parties and additional barriers to access have to be effectively addressed by the State. For non-judicial mechanisms to be truly effective, they need to be legitimate, accessible and equitable, transparent and rights-compatible. Moreover, they need to be predictable in the sense that they have to be clear about the procedure and time frame, the available outcome and the means of monitoring implementation. Finally, they have to be seen as a source of continuous learning. It has to draw on lessons and relevant measures in order to improve the mechanism to ensure its effectiveness.

Non-state based grievance mechanisms, such as operational-level grievance mechanisms have to be established by corporations, in order to make it possible for grievances to be addressed early and remediated directly (OHCHR, 2011, p. 31-32). With these mechanisms, those bringing a complaint can directly engage the corporations in assessing the issues and seeking remediation. Because of this, operational-level grievance mechanisms can identify adverse human rights impact for corporations as a part of their due-diligence, while at the same time making it possible to address these grievances and remediate adverse impacts early so that harms can be prevented from compounding and grievances from escalating. Dialogue and engagement are the central elements and the means of addressing and resolving grievances within these mechanisms.

The UNGPs carry out a clear message regarding the responsibilities of corporations to respect human rights and to provide greater access to remedies for victims. It is crucial to fulfill these responsibilities, especially within the framework of transitional justice, because within such perspective, it is believed to be vital to bring closure and come to terms with the past and provide effective redress to victims of human rights violations, in order to lay the fundamentals of sustainable peace within a transitional society. Despite the clear framework of the UNGPs, it has a non-binding character, whereby the question always will be to what extent these recommendations are actually

being effectively implemented and carried out. Furthermore, the question remains to what extent this framework is relevant and could be adequately fulfilled within transitional justice contexts. Nevertheless, the UN Guiding principles mark a significant step forward in the area of business and human rights, not least because they have secured remarkably strong buy-in from companies that just a decade ago would have disputed the idea they even have human rights responsibilities (Albin-Lackey, 2013). The development of the principles is furthermore a strong acknowledgement of the maladjusted approach that until now has been used to assign human rights responsibilities to large corporations that are continuing their global reach, and through their activities affecting the human rights of a growing number of people in profoundly important ways. But, despite all the acclamations following the announcement of the endorsement of the UNGPs in 2011, rejoicing too quickly could lead to a distraction from the still very present issue of corporate related harm, which still goes unabated. Therefore, it is important to critically evaluate the UNGPs and recognize any shortcomings or potential unintended consequences.

While the UNGPs can be referred to as an important reference framework for dealing with issues of corporate-related harm, the principles in some respects remain a little sketchy. Paul & Schönsteiner (2013) for example, note that the UNGPs fail to recognize and address the fact that corporate-related violations of human rights in conflict situations until now have gone largely unpunished. Within this regard, the interrelationship between judicial and non-judicial mechanisms, as well as the corporate responsibility not to interfere with or try to undermine ongoing judicial proceedings, are clearly issues that need to be further elaborated upon. Moreover, it would have been useful to address the need to maintain a baseline of rights protection within negotiated remedies (Freeman, 2006). This is particularly true for out-of-court settlements, which are preferred by corporations, in which broad clauses prevent future claims against a corporation and do not provide for the public acknowledgement of corporate actors' responsibilities. In order to prevent such trade-offs and ensure adequate compensation, the UNGPs could have been more accurate regarding its compatibility with the right to truth and the right to reparations (Paul & Schönsteiner, 2013).

Altogether, when adapting these arguments to a transitional justice approach, it seems that the UNGPs don't provide sufficient orientation with regard to private voluntary engagement in situations of reparations and redress. Yet, as Paul & Schönsteiner (2013) put it, the preventive focus of the UNGPs offers the opportunity to reinforce one of the fundamental aims of transitional justice, which is to prevent the recurrence of atrocities. As the focus within the UNGPs is on due diligence mechanisms and risk evaluation, it is of considerable importance for corporations to become aware of risks specific to a transitional justice setting, for instance how they relate to (para)military actors and how they affect the rights of displaced individuals or communities. What many believe to be an

excellent initiative to ensure that such precautions are taken, and in this respect the UNGPs fail to address this, is for home states to regulate and sanction corporations operating abroad under the duty to protect. Albin-Lacky (2013, p. 11) emphasizes this lack of extraterritorial oversight, and pleads that it is needed to create “a workable balance that reduces serious human rights abuses while acknowledging the reality of a complex world in which companies do not always have full control over the local environments in which they operate”. The voluntary nature of the UNGPs becomes particularly problematic in this regard, because this makes the regulations only as strong as their corporate members choose to make them, and they don't apply to corporations that choose not to comply with the principles. Hence, as the UNGPs have done a good job in helping to define good corporate human rights practice, it is important, especially within the context of transitional justice, that these rules are enforceable in order to secure the guarantee of non-recurrence. Recent developments around the UNGPs seem to conform this, as the Human Rights Council recently adopted a resolution to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (, whose mandate is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (United Nations Human Rights Council, 2014).

3.3.2 Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights

Against the backdrop of the concerns raised with regard to the framework of the UNGPs, Ecuador and South Africa, countries that already experienced difficulties in addressing corporate human rights violations, jointly presented a proposal to the Human Rights Council for the elaboration of a binding legal instrument to address corporate human rights violations. The proposal was adopted in Resolution A/HRC/RES/26/9 on 26 June 2014, which led to the establishment of an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. The newly established working group focuses on measuring the implementation of a legally binding instrument on Business and Human Rights and looks at the possibilities and current gaps regarding the implementation of such a framework. Some general statements that can be concluded from the first session of the working group show that the participating parties in general perceive it as a historic moment and a new phase of common endeavor for the promotion and protection of human rights. Several countries insisted on the fact that a prospective instrument should be based on a broad scope and cover all human rights and human rights violations. Moreover, limiting a prospective instrument to address some violations of human rights could be seen as equivalent to tolerating certain violations (UN General Assembly,

2016, p. 13). Another key conclusion points to the fact that there are no contradictions between the implementation of the UNGPs through national action plans, and the adoption of a legally binding instrument. Meyersfeld (in Mohamadih & Uribe, 2015, p. 1) states that seeing a legally binding instrument and the UNGPs as binaries is “incorrect and destructive”. Rather, it was noted that a legally binding instrument would re-enforce the process of the UNGPs, and it can be seen as a logical extension and advancement from these principles (UN General Assembly, 2016, p. 7). Furthermore, it was concluded that a future instrument should address major legal voids with respect to the rights of victims affected by corporate human rights violations. By doing so, it is important to take into consideration the specificities of countries’ legal systems, social norms and traditions and stages of development (UN General Assembly, 2016, p. 10).

With regard to state obligations, it was concluded that the effective articulation and application of extraterritorial obligations for states would be an essential element within a prospective instrument in order to fill the gaps in the current international legal order (UN General Assembly, 2016, p. 12). States can’t ignore the fact that they may influence situations outside their borders, and are therefore bound by extraterritorial obligations, which include preventing third parties from violating human rights in other countries and adopt measures to prevent, investigate, adjudicate and redress such violations. Likewise, the responsibility of corporations to respect human rights entails an obligation to prevent, mitigate and redress human rights violations caused by their operations. Within the session, it was generally agreed upon that gaps exist in the international legal framework with regard to responding to complex structures and economic power of transnational corporations. By these gaps, corporations have been allowed to circumvent their liability in both home and host states. Therefore, several states argued that a prospective instrument should include “clear obligations for corporations” in order to prevent, mitigate and redress potential human rights violations that might be committed as a result of their operations (UN General Assembly, 2016, p. 14-16).

When coming to the point of identifying standards for legal liability of transnational corporations and other business enterprises, it was concluded that there is no impediment to be held liable and assign legal responsibility to a corporation, either as a legal person or as a group of persons. A prospective instrument could address and clarify several elements of such a standard for legal liability of transnational corporations and other business enterprises. First, the types of conduct fostering legal liability for corporations should not be limited to direct liability for human rights violations, but should cover standards of “complicity and conspiracy” (UN General Assembly, 2016, p. 18). Second, elaborating a prospective instrument should address and “clarify the term of responsibility”, given that practices and legal traditions vary among states (UN General Assembly, 2016, p. 15). Third, a prospective instruments should help “defining the (trans)nationality of the

corporate actor”, which is approached in different ways, or the territory in which the majority of its operations take place (UN General Assembly, 2016, p. 18).

As can be concluded, the recently established working group on the issue of transnational corporations and other business enterprises marks the beginning of the search for a new international legally binding instrument and the implementation of the Guiding Principles. These two processes should not be seen as contradictory, but rather as complementary objectives. Furthermore, in addition to the regulation of the responsibility of corporate actors in relation to human rights, states carry an important responsibility to fulfill their obligation of protecting their citizens against corporate activities. The establishment of the working group can be seen as a strong acknowledgement of the adverse human rights impacts transnational corporations can have and the difficulties that victims face to remedy such violations. Despite the fact that the development of a binding instrument on transnational corporations is still in its infancy, the establishment of the working group can be seen as an important step in strengthening the protection of human rights against abuses committed in the context of corporate activities. This would furthermore be a major step within transitional justice research, as these two aspects are often linked to each other. A couple of delegations in the first session of the working group acknowledged the particular need to protect against human rights violations in conflict zones. In this regard, it was stated that it is of vital importance for the legally binding instrument to include language aimed at preventing and “addressing heightened risk of business involvement in abuses in conflict situations” (UN General Assembly, 2016, p.16). In response, a panelist noted that “provisions to deal with violations in conflict zones” should be added, as well as provisions to deal with gross violations of human rights (UN General Assembly, 2016, p. 17). The adoption of such provisions seems to be an essential element of effectively dealing with corporate human rights violations within transitional justice contexts, as the history of corporate accountability in transitional justice contexts shows that the need for improvement in this area seems to be evident.

4 The 'Corporate Dilemma' in Transitional Justice Processes

A look at the history of corporate accountability in transitional justice contexts shows that there is almost a non-existing link. However, with the growing impact of corporations in mind and the expanding interest for and studies on the involvement of corporations in human rights violations and the implementation of legal rules in the area of corporate accountability, there is reason to explore this link. The following section will outline examples of holding corporations accountable for their alleged involvement in human rights violations within situations of conflict or repression. The main mechanism in transitional justice that has explored the role of corporations in these situations has been truth commissions. By looking at experiences and recommendations of previous truth commissions, it can be illustrated how in the past the issue of alleged involvement of corporations has been dealt with. Furthermore, we will also look at some judicial mechanisms that have been used for holding corporations accountable for human rights violations within situations of transitional justice.

4.1 The Nuremberg Trials

Although the main focus in holding actors accountable for war and conflict-related human rights violations is aimed at individuals or states, the involvement of corporations has not been denied completely. A good example of this are the Nuremberg Trials, which began after the end of the Second World War and the establishment of an International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis countries. The Nuremberg Trials were divided in 12 sections to deal with all the actors responsible for the atrocities carried out during the Second World War. The sixth section was assigned to the involvement of the German chemical conglomerate I.G. Farben, of which large corporations as BASF, Bayer and Hoechst have come forth. It is within this section of the trials where the first remarks were made about the complicity of corporations within conflict-related human rights violations. The Nuremberg trials explicitly pointed out to this idea:

“Those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it [...]. He [Hitler] had to have the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent [...] if they knew what they were doing” (International Military Tribunal, 1946, p. 58).

The complicity of the industrial corporation was thus established by a knowledge factor, through which they were convicted of aiding and abetting to human rights violations carried out by the Nazi regime. The investigation further concluded that without I.G. Farben's immense productive facilities,

its intensive research, and vast international affiliations, Germany's continuation of the war would have been unthinkable and impossible, and that it was a two sided attempt to expand the German industrial potential for war and to restrict that of the rest of the world (Elimination of German Resources for War, 1945, p. 7). In this way, a lot of evidence pointed to the fact that I.G. Farben officials had full knowledge of the plan of the Nazi regime for world conquest, and that they planned their operations accordingly and anticipated expanding their empire on the plunder acquired. Thus, the Nuremberg trials showed that economic greed was one of the key factors in bringing about the Holocaust. However, the Nuremberg Tribunal had only jurisdiction concerning individuals, and therefore only convicted the corporation's officials. Furthermore, the issue is not whether a corporation itself can violate international law, but rather how a corporation can be held responsible for such violations. After Second World War, the need for compensation gained immediate importance, as the victorious powers signed the Potsdam Agreement in 1945, which included compensation for the war victims to offset losses and sufferings (Heinelt, 2010). The actual provision of effective compensation for the victims by the involved corporations, however, took a lot of time and tough negotiations.

After lots of victims of the concentration camps of the Nazi regime filed lawsuits against corporations, they demanded compensation for the violations of the Second World War. In 1951, a Claims Conference was founded as a coalition of several Jewish organizations to represent the compensation claims and to negotiate with the German Government and German corporations about compensation agreements. How the German corporations thought about the issue of compensation can be clearly illustrated by the example of Krupp, a large steel and arms corporation. Almost fifteen years after the end of the Second World War, the corporation announced that "the amount of at least 6 million but no more than 10 million DM was to be paid" to former Jewish concentration camp prisoners "who worked at Krupp plants as a result of National-Socialist measures" (Heinelt, 2010, p. 1). Furthermore, each entitled claimant would receive the amount of 5,000 DM. The corporation referred to the compensation as "a personal contribution toward the healing of the wounds suffered in the war" and "a charitable gesture, which signified no recognition of any legal obligation"(Heinelt, 2010, p. 1). As the number of claimants exceeded by far the amount that was originally assumed, Jewish forced laborers received only a small amount of money as a compensation, and non-Jewish victims and persons who had performed forced labor but had not been imprisoned in concentration camps were already barred from any claims to payments from the corporation's compensation fund (Heinelt, 2010). As a consequence, victims of the Nazi regime hadn't been provided with effective redress, and were awaiting promises of potential future reparations for more than fifty years. Eventually, with pressure from the United States and other Western occupying powers in the Federal Republic of Germany, a domestic settlement system was

developed in order to compensate those who had been persecuted by the Nazi regime for political, religious, or racist reasons (Pawlita, in Heinelt, 2010). This was established as a result of a meeting between the federal government with representatives of twelve large German firms, among them Bayer, BASF, DaimlerChrysler, Hoechst, VW, BMW, and Thyssen Krupp. This new settlement operated under the much disputed name of “Wiedergutmachung”, aimed at the “restitution of ascertainable assets” and “indemnification for personal injury damages”, may it be damage to body or health, professional or economic advancement, property and assets, or deprivation of liberty (Schwarz, 1988). As a result of this new “Wiedergutmachung” approach, an agreement was made to establish the “Remembrance, Responsibility, and Future” Foundation, which would provide 10 billion DM for the victims of the Nazi regime, provided in equal amounts by the German government and German industry (Heinelt, 2010). In 2006, more than sixty years after the end of the Second World War, the foundation noted that it has fulfilled its mission in accordance to the appointments made by its establishment.

The compensation payments of corporations after the Nuremberg Trials can be seen as an example of a way in which a government and corporations jointly, beyond the legal rule, can contribute to reparations and a certain degree of justice for victims. However, within this case, the firms concerned emphasized that the “willingness to compromise” was due to a “moral and humanitarian attitude” and refused any acknowledgement of a legal obligation to pay compensation, while insisting in return the Claims Conference must forego legal steps against them (Heinelt, 2010). Hence, this case also shows the complexities in holding corporations accountable for their role in conflict-related human rights violations and, as a result, in letting them provide effective redress for victims. Nevertheless, this case ultimately shows the need for justice and reparations for victims to effectively bring closure to past atrocities, as claims were carried out by them for more than fifty years. Although it faced many hurdles, it can be seen as a first attempt to achieve a solution for dealing with cases of corporate-related human rights violations, coping with collective damage, and an example of dealing with past injustice of historic dimensions across legal barriers.

4.2 Liberian Truth and Reconciliation Commission

As part of the transitional justice process in Liberia, a Truth and Reconciliation Commission was installed with the mission to explain how Liberia became what it is today, to make recommendations to ensure non-repetition of the past, and lay the foundation for sustainable peace, unity, security and reconciliation (Liberian Truth and Reconciliation Commission [LTRC], 2009). In order to understand the complexities of the Liberian conflict, the TRC had a broad mandate with inclusion of a focus on economic crimes and violations of human rights law. By carrying out this mandate, the Commission investigated the involvement of corporations in economic crimes and human rights violations (LTRC,

2009, p. 12-13).

The Liberian TRC found that at least seventeen corporations either supported militias in Liberia, participated in, or facilitated, illegal arms and trafficking, or otherwise aided or abetted civil instability (LTRC, 2009, p. 292-293). These corporations were largely active in areas of extractive industries, mostly timber and mining corporations. The TRC found that there was a strong link between the human rights violations and the corporations. Mismanagement and the control of natural resources by multinational corporations was not only a motivating factor in the war, those resources ended up funding the armed groups perpetrating the conflict (Apland, 2012). Hence, the TRC stated that all corporations and their officers who have provided assistance to armed groups share responsibility for human rights violations (LTRC, 2009, p. 336-337). Although corporate involvement in human rights violations was clearly addressed by the Liberian TRC, it failed to extensively explain the meaning of 'aiding and abetting' to human rights violations, and to make an explicit link between these human rights violations and the obligation to provide reparations. As a result, the corporations haven't faced any obligations for their involvement in human rights violations, and the victims were left without sufficient redress.

With regard to the human rights violations by corporations, the TRC put forward several recommendations in its final report (LTRC, 2009, p. 43-44). First, tax arrears from timber, mining, petroleum, and telecommunications corporations that evaded tax liability under the previous regime had to be recovered. Second, funds from economic criminals that are sentenced by Liberian courts to pay restitution or other fees had to be obtained. Third, criminal and civil confiscation schemes in foreign jurisdictions had to be utilized to repatriate Liberian assets. Although these recommendations urged the need for reparations for corporate human rights violations, they weren't implemented by the government. The government pushed the recommendations aside, with the statement that the country still had to deal with "challenges of corruption".

Although the effort of the TRC to hold corporate actors to account for past human rights violations was inconsistent, by means of its report it had been able to detail the impact of illegal timber exploitation during the conflict and the role played by corporations. This was possible because of the collaboration among local civil society, government and international community representatives in the Forest Concessions Review Committee, whose data the TRC used (Carranza, 2015). This shows that cooperation and respect among international technical expertise, local civil society and national government knowledge, can be very valuable in effectively examining corporate accountability in post-conflict contexts. However, the lack of follow-up for the recommendations coined by the TRC illustrate the logic that 'might makes right'. For the perpetrators of human rights violations, these recommendations are a recipe for disunity, disorder and chaos. Therefore, the major challenge facing Liberia and its leaders within this regard is choosing between order and

justice. While order is important, impunity could seriously undermine the peacebuilding process in Liberia. If democracy and rule of law are the future of Liberia, then such a move would certainly undermine the emerging democratic process as well as the confidence of people to believe in such future (Aning & Jaye, 2011).

4.3 South African Truth and Reconciliation Commission

South Africa's transition from apartheid to democracy in 1994 has been a challenging and complex task. In order to deal with the legacy of the apartheid regime and bring closure to the past, South Africa developed a Truth and Reconciliation Commission with the overall objective of establishing a picture as complete as possible of the political conflicts of the past, and address the causes, nature and extent of the human rights violations which were committed during the period of 1960 to 1994. The over-arching aims of the TRC were to promote national unity and reconciliation in South Africa. In order to achieve and advance these goals, the commission was empowered with granting amnesty to those who gave full disclosure of all the facts relevant to the human rights violations in question. In this way, the work of the TRC brought together the elements of truth, justice and reconciliation.

To investigate the gross human rights violations that happened under the apartheid regime, the TRC organized various sector hearings (South African Truth and Reconciliation Commission [SATRC], 1998, p. 18-58). Through those hearings, the significant contribution to human rights violations under the apartheid regime of each sector of the country was examined. One of these hearings was assigned to the business sector. It was found by the TRC that corporations had played a central role in maintaining the economy under the apartheid regime. To capture the different degrees of guilt for the corporations, a distinction was made between first-, second- and third-order involvement of corporations in the apartheid regime (SATRC, 1998, p. 23-36). First order involvement includes corporations that have played a direct and central role in helping to design and implement the apartheid policy. As the TRC found, several mining corporations had been guilty of the latter. Second order involvement had to do with corporations that knew that their products or services were used for morally unacceptable purposes. This was largely the case for the arms and transport industry. Lastly, third order involvement referred to those corporations that prospered under the apartheid regime and possessed structural advantages of the concentration of wealth in the hands of the white minority. The white agricultural industry can be placed in this category, as it benefited from the privileged access to land.

As the overall conclusion of the TRC shows, corporations in general have played a central role in human rights violations and crimes carried out under the apartheid regime. As a consequence, the TRC stated that corporations should contribute to the reparation process for the victims of the apartheid regime. Furthermore, it formulated several recommendations about how corporations

could fulfill this responsibility. These recommendations included: a wealth tax; a one-off levy on corporate and private income; a one-off donation of 1 percent of the market capitalization listed in the Johannesburg Stock Exchange; a retrospective surcharge on corporate profits backdated to an agreed time; responsibility for the payment of the previous government's debts (SATRC, 1998, p. 318-319). Although clearly stating that the corporations had a responsibility to contribute to the reparation for victims of the apartheid regime, the recommendations of the TRC were rejected by both the government and corporations, with the argument that reparations were not the way to go. Unfortunately, as Terreblanche (in Michael, 2003) stated, "the poor were let down again in favor of business interests". The decision of the South African government to refuse the recommendations of the TRC can be seen as indicative for the political tensions around the proposition whether corporations should be held accountable for complicity in human rights violations, or receiving amnesty to promote economic growth. The South African government clearly opted for the latter, leaving the victims without sufficient redress.

After rejecting the recommendations of the TRC, the government of South Africa launched a Business Trust Fund in order to restore the debts and ravages of the apartheid regime. By doing so, the government authorized a one-time payment of 74 million dollars, which was 300 million dollars less than the amount recommended by the commission, to promote the national well-being of South African people in general⁴. Rather than imposing a tax on businesses, president Mbeki called upon voluntarily contributions of corporations to the reconstruction and development of the country. Hence, the Business Trust Fund may not be seen as a form of compensation and reparation, as it isn't a response towards the individual harm suffered by the victims and it wasn't used for reparation of the victims.

The discontent regarding the failure of the reparation process and the lack of implementation with regard to the recommendations of the TRC by the government encouraged victims to seek for new ways in which they could receive reparation and compensation for the harm done under the apartheid regime. As a result, the Khulumani Support Group was established by South African victims of human rights violations under the apartheid regime⁵. The organization filed several claims against corporations under the Alien Tort Act for their complicity in the apartheid regime, but without significant success⁶. The attempts to find justice and reparations via judicial means were opposed by the South African government. Moreover, the Kiobel decision in the Alien Tort Act makes the call for reparation via this judicial way powerless (Gear & Weston, 2015).

Despite the general positivist perspectives about the Truth and Reconciliation process in

⁴ See <http://www.btrust.org.za/>

⁵ For more information and publications of the group, <http://www.khulumani.net/>

⁶ See <http://business-humanrights.org/en/apartheid-reparations-lawsuits-re-so-africa>

South Africa, it was not able to hold corporations accountable for their involvement in human rights violations under the apartheid regime. As a matter of fact, the legacy of the apartheid regime remains clearly visible within parts of the business domain. An example is the tragedy in 2012 that is known as the 'Marikana massacre', in which 34 miners were killed in a protest for workers' rights. The savagery of the murders removed any pretensions that a post-apartheid South Africa had got rid of its white supremacist past.

4.4 Timor-Leste Commission for Reception, Truth and Reconciliation

The Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR) was established in 2001, in order to fulfill a triple mandate that had to deal with the human rights violations carried out under Indonesian military rule in the country. First, the reception component reflects the return of Timorese displaced people and their reintegration into their communities. Furthermore, the CAVR was mandated to establish the truth about the human rights violations and to determine accountability. Lastly, the focus within the CAVR was on community reconciliation (CAVR, 2006).

The Timor-Leste commission used a very broad definition of human rights violations, stating that this includes violations of international human rights standards, violations of international humanitarian law, as well as criminal acts. These broad categories addressed by the CAVR demonstrates clearly the mandate was intended for the examination of both state and non-state actors. With regard to corporations, the CAVR stated the following: corporations have a legal obligation to provide reparations to victims, and there is a direct link between human rights obligations for corporations, the violations they aided and abetted, and their obligation to provide reparations. The CAVR further pointed that: "business corporations who supported the illegal occupation of Timor-Leste and thus indirectly allowed violations to take place, are obliged to provide reparations to victims based on the principle of international responsibility recognized in the international customary law of torts" (CAVR, 2006, p. 42).

The recommendations of the CAVR suggest that the obligation to provide reparations has to be carried out by Indonesian business corporations, including state-owned enterprises, and other international and multinational corporations and businesses who profited from war and benefitted from the occupation. The reparations scheme, in this way, had to be jointly funded by all the other actors involved in the human rights violations under the military rule (CAVR, 2006, p. 42).

Although the CAVR forms a clear example of stating that corporations, among others, should be held accountable for their contribution in human rights violations and their obligation to engage in a national reparation program, this didn't lead to any concrete action. The recommendations were endorsed by the government, although the implementation has made little progress since then. Therefore, justice for human rights violations carried out in Timor-Leste still remains unfinished

business, and issues surrounding truth and reparation for past abuses have been sidelined until now.

In order to enhance accountability and justice with regard to past human rights violations in Timor-Leste, the UN established a Serious Crimes Unit (SCU) to try serious violations of human rights. This was seen as particularly important, as “accounting for the violations of human rights which occurred in the aftermath of the consultation process is vital to ensure a lasting resolution of the conflict and the establishment of the rule of law in Timor-Leste” (UN General Assembly, 1999). However, as Walsh (2013) ascertains, only a small number of serious crimes from Timor-Leste have been prosecuted and these relate only to offences from 1999 committed by East Timorese who stayed in or returned to Timor-Leste after the vote for independence. Hence, the greatest difficulty facing the SCU in its investigations was that the majority of the suspects were beyond its jurisdiction in Indonesia. In this way, the lack of Indonesian cooperation with the serious crimes process constituted a major obstacle of which the results were devastating. Not only none of the corporate related human rights harm had been effectively addressed by the serious crimes process, out of the total 391 indictments, 339 perpetrators remained at large.

As in other cases, the CAVR in Timor-Leste has been mainly important in the documentation of the responsibilities and role of corporations in human rights violations within a period of violent conflict, but it hasn't been powerful enough to actually hold the corporations accountable for their alleged involvement.

4.5 Legal Proceedings against Transnational Corporations in Argentina

In addition to the contribution to corporate accountability within transitional justice contexts by non-judicial mechanisms, such as Truth Commissions, there is also the opportunity to seek for corporate accountability through judicial means. This section will focus on a few emblematic cases that evidence the complicity between a number of large corporations and the armed forces during Argentina's military dictatorship, which has given rise to several legal proceedings in the country. Among those are large corporations like Acindar, Astarsa, Dálmine Siderca, Ford, Ledesma and Mercedes-Benz. As a result, several criminal lawsuits have been filed against some of these corporations, which are currently pending in court. Within this section, the characteristics of the relationship between companies and military forces during the period of dictatorship in Argentina will be explored in order to illustrate the corporate complicity in human rights violations under the repressive regime in Argentina and the way in which these human rights violations have (not) been addressed after the regime was deposed.

As recent investigations show, both from independent researchers and various legal action, complicity of corporations within the military regime in Argentina has been a fundamental aspect of the repression in Argentina. In the case of Astilleros Argentinos Río de la Plata S.A. (ASTARSA), on the

day of the coup in 1976, 60 workers were abducted from the shipyard with the consent of the corporation, who willingly allowed the presence of the military and contributed to the identification of the workers. In this case, there is a close relation between business sectors, trade unions and the bureaucratic sectors of the military (Basualdo, 2006). The case of Acindar, a large corporation in the steel industry, includes violations before and during the dictatorship and has opened up a lot of accusations of kidnapping, disappearances, and deaths. The corporation held a close relationship with the police, established by, inter alia, extraordinary cash payments. Moreover, there was a clandestine detention center within the corporation's working ground (Payne & Pereira, 2014; Basualdo, 2006). The case of Dálmine Siderca shows the connection of the corporation with the army, which was installed at the gates of the corporation and provided with a list of 'undesirable' workers who worked for the company. Eventually, these workers were detained in a clandestine torture center that was next to the factory and connected to it through a door (Basualdo, 2006). An element in common with other cases is that most of the detained workers were strong union activists. According to testimonies of former workers of the Ford Motor corporation in Argentina, there was a permanent presence of armed forces on the working ground. These testimonies further explain the contribution of the corporation to the repressive security apparatus by providing lists of names, national identification numbers, and even photographs and home addresses of union workers, who were later taken off the Ford factory floor to be tortured and sent to military prisons (Basualdo, 2006). Ledesma, a large sugar corporation in Argentina, also allegedly was involved in human rights violations by, inter alia, providing trucks that were used in the kidnapping of their workers. Moreover, the corporation allowed the armed forces to set up a clandestine detention center, Esquadron 20, on its plant (Basualdo, 2006). Lastly, the corporation is accused of complicity in the 'Noche del Apagón' ('Night of the Blackout') in which an estimated 400 workers, students and professionals were allegedly kidnapped, tortured, killed and disappeared. Ledesma's alleged involvement in the incident involves the cutting off of the electricity to facilitate the military operation (Basualdo, 2006). The case of Mercedes-Benz, which is currently known as Daimler Chrysler, also consists of evidence regarding complicity of the corporation with the repressive regime. The corporation signed an agreement in 1975, establishing that 1% of the sales price of each vehicle would be dedicated to the formation of a special fund for the "eradication of negative elements" from the factory, in exchange for the supposedly representative body of workers to take care to ensure their effective enforcement. After the coup of 1976, abductions of workers and activists occurred on the grounds of the corporation (Basualdo, 2006). Furthermore, the corporation is accused of a creation of a 'blacklist' of workers who were then kidnapped. In order to fully understand the close relationship between the management of the corporation and the military regime, note that Mercedes Benz, as one of the major industrial complexes in the country, had as its

main customer the Argentine Army, which bought the Unimog trucks from the corporation (Basualdo, 2006).

The information collected from these six cases show that there was a strong common pattern of collaboration of large corporations with the repressive forces in Argentina by the provision of vehicles, infrastructure, money, the granting of free access to the working grounds, the removing of any obstacles to the actions of the armed forces, along with the acceptance of hiring undercover personnel, in order to monitor their workers and receive intelligence reports on their actions. Despite all this comprehensive evidence of the relationship between the military regime and large corporations in Argentina and the corporate complicity in human rights violations carried out by the former regime, transitional justice efforts remained incomplete. The Argentinean truth commission CONADEP for example lacked judicial authority to act on its findings and looked almost exclusively at enforced disappearances. Although the attempts to provide forms of restitution, compensation, and rehabilitation to victims of human rights violations have been numerous⁷, most cases regarding disappearances, torture, and extrajudicial executions carried out by the military regime either remain unresolved or are still pending in Argentinean Courts⁸. The current failure to address the economic factors that have influenced or contributed to maintain a particular dictatorship or repressive regime constitutes a dangerous historical blindness, which is reflected in the mandates of all truth commissions to date (Bohoslavsky & Opgenaffen, 2010). However, the fact that trials are ongoing offers a unique opportunity for Argentina to set a precedent for future transitional justice mechanisms. These trials demonstrate the need to look at civil complicities to determine the truth about a given regime's functioning, as "situations of transition offer unique windows of opportunity to address issues of impunity which are of crucial importance in a society's development" (Cavallero & Albuja in McEvoy & McGregor, 2008, p. 135).

4.6 Corporate accountability in transitional justice processes: the elephant in the room

The case studies explored in this research reveal a common thread within past transitional justice experiences. As these cases show, many post-conflict countries whose transitional justice processes have focused on a narrow conception of human rights violations, still continue to deal with the legacy of unaddressed economic exploitation and other systemic injustices. The reasons for such a narrow conception are to be found in the fact that transitional justice originally focused on the protection of civil and political rights, and therefore on addressing crimes attributed to security

⁷ See for example the Daimler Lawsuit and Ford Lawsuit in Argentina, <http://business-humanrights.org/en/daimler-lawsuit-re-argentina> , <http://business-humanrights.org/en/ford-lawsuit-re-argentina>

⁸ Mercedes Benz (Daimler) Lawsuit is currently pending, <http://business-humanrights.org/en/daimler-lawsuit-re-argentina>

forces and government leaders. Furthermore, there was a strategic decision to use the international mechanisms for the protection of human rights available at that time, which similarly focused on the establishment of criminal trials to hold accountable state perpetrators, on breaking the silence surrounding the crimes, and on not antagonizing the liberal economic policies that flourished in the 1990s. However, there are several factors that underlie and explain the increasing attention to the economic dimension in recent transitional justice works. As Roht-Arriaza (in Bohoslavsky & Verbitsky, 2016) describes, among these are the persistence of the socioeconomic problems underlying authoritarian periods, the rising economic, social, and cultural rights demands, the growing human rights focus on non-state actors, and the convergence of agendas leading to look for the roots of current economic struggles in the failure to adequately confront the past.

The cases explored in the previous paragraphs indicate the continuation of struggling with effectively addressing corporate involvement in human rights violations during periods of armed conflict and repression. The Nuremberg Trials acknowledged the importance of addressing corporate actors as perpetrators of human rights violations carried out in the Second World War. However, although it has been considered a progressive mechanism by establishing corporate complicity for the war crimes, it failed in letting these corporations provide reparations and remedy for their harmful acts. Only after more than sixty years, victims of the Second World War received a small amount of money as compensation, which was not to be seen as any form of acknowledgement. The Liberian TRC delineated clear recommendations to address the corporate-related human rights violations during its oppressive regime, but they were wiped away by the government. South Africa acknowledged the role of corporations in continuing the apartheid regime and, as a result, proposed concrete measures for corporations to provide remedy for victims of the apartheid regime. Yet again, the government ignored the recommendations of the TRC, which has left the victims with feelings of betrayal. As noted by Dewhirst & Valji (2003), the "miracle" of a new South Africa is hardly sustainable if it is built without restoring the dignity and humanity of the majority of its citizens, nor if it fails to address the economic inequalities which fuel social conflict. As a consequence, victims began to unite themselves within the Khulumani Support Group in a final attempt to achieve justice, but without significant success due to legal barriers. Within the transitional justice process in Timor-Leste, the CAVR concluded that corporations that supported the illegal occupation of the country were obliged to provide reparations, as they allowed the violations to take place in this way. Although the recommendations were acknowledged by the government, much remains to be done to achieve the rights to truth, justice and reparations for the victims of corporate related harm in Timor-Leste. Among other things, a lack of Indonesian cooperation with the process in Timor-Leste has resulted in the fact that until now little progress has been made with regard to the implementation of the recommendations. In Argentina, several legal proceedings against large

corporations, which are allegedly involved in human rights violations under the Argentine dictatorial regime, are still pending in courts. Although the evidence of such corporate related human rights violations becomes more often publicly known, the history of these matters within a transitional justice context makes it especially questionable whether this will actually lead to effective remedy for victims. Whereas transitional justice mechanisms have been very valuable with regard to the documentation of the responsibilities and the role of corporations in human rights violations within periods of violent conflict, it repeatedly lacked follow-up for the implementation of their recommendations.

By discovering this emerging trend, corporate accountability in transitional justice processes can be seen as the elephant in the room. Even when such issues have been properly investigated and disclosed by transitional justice mechanisms, this has hardly led to any concrete sanctions for corporations, any form of acknowledgement for their part in the violations and any sufficient redress for victims. As previously explained, an important aspect for the fact that impunity prevails for corporate actors in scenarios of transitional justice, can be found in the general belief that within a country that is recovering from a long period of repression or conflict, economic growth is to be largely prioritized above any other measures of development. Therefore, anything that could scare investments away, including discussions on corporate accountability, is regarded with great apprehension within transitional justice contexts. However, as can be concluded from these cases, such a belief threatens the long-term sustainable peace and reconciliation that is aimed to be achieved by transitional justice processes, as victims are constantly left without sufficient redress. Hence, it is important that economic development and corporate accountability should not be framed as a trade-off. Any transitional justice process that disregards the accountability of corporate actors or provides them with amnesties at the expense of remedy for victims, finds itself in immediate betrayal of fundamental human rights and the rule of law, which are believed to be the foundational principles upon which a new emerging peaceful and sustainable society has to be built.

Transitional contexts present unique opportunities for the reinvention of legal and political cultures (Szoke-Burke, 2015). Therefore, careful consideration of the challenges faced by transitional justice mechanisms to deal with corporations is crucial in order to develop a comprehensive transitional justice approach that adjusts to the changing world context. Within this regard, the case studies in this research unveil that there is a lack of clear rules covering the obligation for corporations to provide prompt, adequate and effective remedy for victims if they allowed, by action or omission, human rights violations to take place. As a result, large groups of victims are marginalized and still excluded from the effective remedy they ought to have, whereby a sustainable transition becomes obstructed. It is therefore of significant importance to look at the countries which are next in making the transition from conflict or repression towards sustainable peace. From this

perspective, the case of Colombia is particularly compelling, not least because of the given role that resource control played in the conflict. Within this regard, addressing corporate accountability within the Colombian transitional justice context is critical to breaking down impunity, addressing the causes of conflict and achieving a sustainable transition and economic development. As the Colombian peace agreement is gradually being developed at the negotiating table, bringing an end to the longest running conflict in the Western Hemisphere, its transitional justice process could, if properly carried out, be a model for the changing paradigm in transitional justice which includes effectively addressing the economic dimension.

5 Colombia: The Path towards Peace and Justice(?)

As the peace talks are proceeding in Colombia, the country is looking at what has caused the fifty years of violence which have constituted the longest running conflict of the Western Hemisphere. Throughout all these years, the internal armed conflict has had a devastating impact on the country and its civilians, leading to over 220,000 murders, over 6,000,000 internal displacements and more than 25,000 disappearances (IDMC, 2014; CNMH, 2013). The main actors who fought in the armed conflict to increase their influence over the Colombian territory have been: the Colombian government, the paramilitaries of the United Self-Defense Forces of Colombia (AUC), the guerilla groups Revolutionary Armed Forces of Colombia – People's Army (FARC-EP) and the National Liberation Army (ELN). Exploring the causes of the conflict reveals the fact that these are both complex and multifaceted, as even the Colombian society itself has not established on a consensus on the nature and origins of the armed conflict. It may be clear that the violence within the conflict does not revolve around a single clearly delineated polarity, with a specific core of economic or ethnic conflicts, but instead is due to interrelated dynamics and historical processes, which are reflected in more fluent identities and produce frequent changes in territorial control (González, 2004). Acknowledging this, it seems to be vital to address, in addition to the root causes of the conflict, the elements that have contributed to the protracted persistence of the Colombian conflict. Within this regard, there is a significant role for corporations and their economic interests over the rich resources of Colombia. The activities and working methods of these corporations in Colombia have had a direct impact on the development of the conflict in certain areas, particularly through their relationship with the paramilitary groups that operate in those areas (Martin-Ortega, 2008). By exploring this relationship, it seems to be evident that corporations have played a significant role in fuelling and financing the war system in Colombia. Therefore, if a transition towards a sustainable and peaceful situation in Colombia is to be finally achieved, the gross human rights violations carried out as a result of the relationship between corporations and paramilitary organizations should be dealt with.

5.1 Paramilitary violence and alleged involvement of corporations

As the country is rich in natural resources and being considered an emerging economy, Colombia has been an attractive place of conducting business during the last decades. In recent years, Colombia's economy has undergone a steady growth, sectoral production has diversified, tourism has regained momentum, and foreign investment has tripled in volume since 2002 (Rettberg, 2015). Over the past decades, large corporations within the extractive industry sector, such as the areas of coal mining, iron, oil and banana industry, have settled in Colombia to profit from the economic successes of the private sector and to start the exploitation of natural resources for export. Simultaneously, however,

the country had still been facing an unresolved armed conflict that stands among the heaviest in the world with already almost eight million registered victims (Unidad de Víctimas, 2016). The Colombian conflict has transformed over time, and together with the political claims of each group, it has been affected by disputes over economic resources (Martin-Ortega, 2008). Hence, the aforementioned developments led to an emerging war economy in the country that has largely been due to war-related devastation and the ongoing weakness of the state. Although this development has mainly been associated with the drug trade in Colombia (Mejía & Restrepo, 2011), this emerging war economy has also interacted with the extractive industry and other legal resources (Rettberg et al., 2011). In this way, the private sector in Colombia became involved in the conflict.

In order to understand the involvement of the private sector within the Colombian conflict, it is important to understand the relationship between the paramilitaries and corporations. The implication of this relationship within the conflict can be seen as directly related to the lack of effective control that the state apparatus exercises over certain parts of the country, mostly rural areas (Martin-Ortega, 2008). In this way, the extractive and agricultural sectors have been hardest hit, as they are most exposed to illegal actors in remote regions where state institutions remain weak and there are abundant opportunities for illegal and criminal actors (Rettberg, 2015). As a response, these business sectors privately organized both legal and illegal means to secure their activities. On the one hand, they organized private security companies which have been progressively regulated. However, on the other hand, they have used the terrorizing powers of paramilitary groups as security services, often in alliance with members of the armed forces, in order to suppress social protests in rural areas, intimidate workers, resolve labor disputes, and even to displace entire local populations with the aim of using their land for their investments (Martin-Ortega, 2008 ; Rettberg, 2015). As a result, the corporate-paramilitary relationship has often had deadly consequences for trade unionists and labor activists, being the subject of serious human rights violations such as disappearances, extra-judicial killings, unlawful detention and brutal beatings (Kovalik, 2004 ; Martin-Ortega, 2008). As of 2012, Colombia has been branded as the most dangerous place for trade unionists for several years already by the International Trade Unions Confederation (ITUC), and in 2007, 78 out of 144 total trade unionist killings in the world took place in Colombia (ITUC, 2007). Hence, it may be clear that the corporate-paramilitary relationship, which is referred to by Richani (in Pringle, 2013) as “a looting process under legal camouflage”, has had a devastating impact on the Colombian civilians and a fomenting effect on the conflict, while safeguarding the profit margins for corporations.

For several years, the relationship between paramilitaries and transnational corporations in Colombia had been denounced, before some of these cases came in court. It was only in March 2007, that the specific paramilitary-corporate war system became uncovered, as the transnational corporation Chiquita Brand International Inc. publicly admitted to have paid \$1.7 million to the AUC

for the protection of its activities in a volatile farming region in Colombia from 1997 to 2004 (Apuzzo, 2007). Furthermore, in the context of the demobilization of the AUC, the relationship became recognized by both sides, as voluntary confessions of paramilitaries had confirmed this relationship with the corporations of Chiquita, Del Monte, and Dole. The leader of the AUC added that there was no need to pressure, blackmail or threaten the banana corporation, as it was so willing to pay the paramilitaries (Alsema, 2008). After Chiquita confessed the payments, the corporation settled a criminal complaint by the US Government and agreed to pay a \$25 million fine. However, in the following years, several lawsuits have been filed by family members of the trade unionists, banana workers, political organizers, social activists and others who were targeted and killed by the paramilitary group. The plaintiffs contend the complicity of Chiquita in these atrocities, as they financially aided the paramilitary group. Since 2008, Chiquita has sought to prevent the release of 9,257 pages of records submitted to the U.S. Securities and Exchange Commission (SEC) as part of an investigation into illegal payments to the AUC. However, in March 2012, the judge ruled that the victims of the atrocities won the right to sue the corporation for complicity under Colombian Law (Simons & Brown, 2012). Moreover, in April 2015, the U.S. Appeals Court ordered the SEC to release the paramilitary payment files of Chiquita under the Freedom of Information Act (FOIA) (Fresh Fruit Portal, 2015). This current decision can be seen as an important victory for transparency and corporate accountability, which might lead to an increased understanding of the corporate-paramilitary war system in Colombia and it further constitutes a major opportunity for victims to finally receive effective remedy for the gross human rights violations which are directly related to this relationship.

Similar to the case of Chiquita, several other large corporations have been accused of having had relationships with the paramilitaries, and, by doing so, allegedly aided and abetted to the human rights violations carried out by these illegal armed groups in the Colombian conflict. In 2001, several lawsuits were filed against Coca-Cola and two of its Colombian bottlers, Bebidas y Alimentos and Panamerican Beverages Inc. (Panamco). The plaintiffs provided evidence based upon eye witness testimony and records, making clear that the management of the bottling plants were acting in concert with paramilitary groups, that subsequently murdered and tortured the leaders of the Sinaltrainal trade union. Although the facts were uncontested, Coca Cola insisted it was not liable because it did not own the bottling plants in Colombia and therefore had no control over them. In the end, both the cases against Coca Cola and its two bottlers were dismissed before court⁹.

Likewise, Nestle is yet another company which has been allegedly involved in human rights violations carried out by paramilitary security forces against members of the food trade union Sinaltrainal

⁹ For a complete overview of the Coca Cola lawsuits, see: <http://business-humanrights.org/en/coca-cola-lawsuit-re-colombia#c9312>

(Martin-Ortega, 2008). Furthermore, the extractive industry seems to be involved as Dutch peace organization PAX released a report in 2014 called 'The Dark Side of Coal', in which collected evidence from testimonies by victims and former paramilitaries establish the connection between paramilitaries and large coal mining corporations Drummond and Prodeco in the Cesar mining region in Colombia. The collected evidence notes that the corporations are allegedly involved in funding the AUC, exchanging information and coordination with them, and benefitting from forced displacement which has been the result of the paramilitary violence in the mining region (Moor & Van de Sant, 2014). Next to these allegations of large coal mine corporations in Colombia, 19 palm oil corporations have been indicted in 2012 of allegedly meeting with paramilitaries and making arrangements to illegally appropriate the lands of violently displace residents in the western department of Chocó (Kinosian, 2012).

It may be clear that the relationship between paramilitary groups and corporations within the Colombian conflict can be seen as a war system that has played a central role in the continuation of the conflict and the execution of massive amounts of human rights violations during the last decades. The war system developed both through the incapacity of the state to maintain security in the rural areas of Colombia, as well as the greed of corporations to control natural resources and uphold their profit margins. In total, around 12,000 cases of business people allegedly involved in paramilitary activity are subject to investigation in Colombia, according to the Colombian Public Prosecutor (TeleSUR, 2015). However, despite all the collected evidence brought forward in the past lawsuits against the corporations, none of them have faced justice for their complicity in the gross human rights violations. As a consequence, to this day, many victims have yet to receive any form of remedy.

In light of the transitional justice process in Colombia, it is important that this deadly war system becomes effectively addressed and publicly acknowledged, in order to stop the harmful acts that have been carried out as a result of this system and to provide the victims with the effective remedy that they deserve. Not only will this be crucial with regard to coming to terms with the past, as the corporate-paramilitary system can be seen as one of the driving forces of the Colombian conflict, an insufficient approach towards addressing this system will further result in looming risks over the prospects of peace consolidation. As argued by Rettberg (2015), the ongoing incentive structures associated with the looting of legal resources, as well as ongoing state weakness in providing basic service in many regions of Colombia, may foster both recidivism as well as new recruitment in the remaining illegal armed groups as the FARC demobilizes. As the transitional context in Colombia provides unique opportunities to reinvent legal and political institutions, it will be of critical importance to effectively address the corporate-paramilitary war system and establish

responsibilities for corporations in the transitional justice process. Hence, such endeavors will play a vital role in achieving sustainable peace and security in Colombia.

5.2 Colombian Peace Process

The Colombian government has been engaged in peace talks with FARC-EP, the country's largest remaining rebel group, since October 2012. However, in the years prior to this, several landmark events have taken place that have laid the foundation for the transitional justice process in Colombia. As part of the demobilization process of paramilitaries, in 2005, the 'Ley de Justicia y Paz' (Justice and Peace Law) was negotiated as a framework for transition, with the idea of offering former paramilitaries prison sentences in exchange for their full confession. In this way the law was seen as a contribution to achieving national peace, collaborating with the justice system, reparation for the victims, and adequate re-socialization. However, the law's promises of both peace and justice remained elusive in the following years after implementing, as fewer than 10% of the demobilized paramilitaries fell within the purview of the law (CJA, n.d.). Moreover, the law was criticized for its failure to provide adequate incentives for truth telling and reparations. Hence, subsequent jurisprudence has reshaped rules and practices by establishing the 'Ley de Víctimas y Restitución de Tierras' (Victims and Land Restitution Law) in 2011. However, being a post-conflict law in the midst of an unfinished conflict, the progress of the Victims and Land Restitution Law has been faltering due to ongoing threats and killings coupled with the weak implementation of flawed legislation. As a result, according to Amnesty International (2014), little has been done to identify, investigate, prosecute and dismantle the regional economic and political power structures that have executed, supported, commissioned and benefited from forced displacement and land grabbing. Although this law had claimed that it is part of an effort to ensure respect for the victims' right to reparation and to secure their political, civil, economic, social and cultural rights, many victims are still awaiting any form of remedy and the restitution of their illegally appropriated lands. Despite the little actual progress of the Victims and Land Restitution Law with regard to the situation of the large groups of victims in Colombia, its ideas have contributed to the adoption of the Legal Framework for Peace in 2012. The framework contained a package of transitional justice mechanisms designed to facilitate the peace negotiations, prevent impunity for serious war crimes and provide guarantees of non-recurrence to victims. By doing so, the framework made a provision for establishing a truth commission which was intended to investigate the serious crimes committed in the Colombian conflict. Furthermore, a flexible approach for punishment could be granted to those being mobilized, when making a significant contribution to lasting peace, securing truth and reparation for victims. The Legal Framework for Peace, in this way, managed to set up the conditions that made it possible to establish peace negotiations between the Colombian government and the FARC-EP, the largest active

guerrilla group within the country, with the aim of signing a peace deal that would make an end to the Colombian conflict.

The current peace talks between the Colombian government and the FARC have been going on for three years already, as it is nearing a conclusion with both sides hoping to sign a peace deal in 2016. Although the peace talks have made gradual progress throughout these years, the process remains fragile as the General Agreement for the establishment of the peace talks state that “nothing is agreed upon, until everything is agreed upon”. As the negotiating parties already agreed upon issues of land reform, political participation of rebels, illegal drugs trade, transitional justice and victims compensation, considerable progress has been made in order to reach the final issue: ‘end of conflict’. With the FARC and the government gradually moving towards a peace agreement, it has become time to think about ways in which all actors involved in the internal armed conflict can be held accountable and, as a consequence, have to fulfill the obligation of providing effective redress to victims. The time has come to establish the foundations for a new Colombia that will provide sustainable peace within the country after decades of armed conflict. The recently developed agreements on Transitional Justice and Victim Compensation delineate a framework for the Colombian transitional justice process. Although this can be seen as a breakthrough in the peace talks, the details have yet to become clear and the implementation of this framework will be of crucial important to achieve the long term peace and security that is desired by its civilians.

5.2.1 Transitional justice deal

The Transitional Justice deal establishes a scenario that seeks for justice via a Special Jurisdiction for Peace. This Special Jurisdiction for Peace will have competency with respect to all those who directly or indirectly participated in the internal armed conflict. Furthermore, in order to have access to any special treatment, it will be necessary to provide the whole truth, provide reparation for victims, and guarantee non-repetition (Presidencia de la Republica de Colombia, 2015). As is noted within the deal, no amnesty or pardon will be granted for the conducts typified in the national legislation as corresponding to crimes against humanity, genocide, and grave war crimes, among other serious crimes such as the taking hostages or other serious deprivation of liberty, torture, forced displacement, forced disappearance, extra-judicial executions and sexual violence. These crimes will be subject to investigation and prosecution by the Special Jurisdiction for Peace.

The Special Jurisdiction for Peace will be made up of Chambers of Justice and a Tribunal for Peace. In this way, it contemplates two kinds of proceedings (Presidencia de la Republica de Colombia, 2015):

1. Those who will be assigned to the Chambers of Justice and recognize their truth and responsibility, will be sentenced according to recognized conducts, after contrasting them

with the investigations of the Prosecutor General's Office, penalties imposed by other state bodies, existing judicial convictions, and information provided by victims and human rights organizations. The penalty for the ones who recognize their responsibility will have a component involving restraint of liberties and rights, ensuring the fulfillment of the reparation and restoration functions thereof through the engagement in jobs, works and activities and, in general, the satisfaction of the victims' rights. Those who recognize truth and responsibility to very serious crimes will face a minimum duration of five years and a maximum of eight years of effective restraint of liberty under special conditions.

2. Those who fail to reveal the full truth and to recognize their responsibility will face contested trial before the Tribunal. The ones that recognize responsibility for the Tribunal or in belated fashion will be sentenced to prison for five to eight years under ordinary conditions. At last, those who fail to recognize their responsibilities for such crimes, but are eventually found guilty, will be sentenced to prison terms of up to 20 years under ordinary conditions.

Furthermore, the agreement on justice specifies that those persons who, without being part of the armed groups or organizations, have contributed directly or indirectly with committing crimes in the context of the conflict, will be able to be included in the justice mechanisms (FARC-EP International, 2015). If the Chamber considers that there are clear and sufficient bases that makes such actor suspect of a determining participation in the aforementioned serious human rights violations, this actor should be included in the resolution and being judged according to the Special Jurisdiction for Peace. As has been concluded earlier, this specification will be applicable to corporations, as they have been directly and indirectly involved in the human rights violations by action or omission, mainly through providing paramilitaries with financial means and strategic information

With regard to the sanctions in the Special Jurisdiction for Peace, the agreement states that these sanctions will be decided by taking various factors into consideration: the extent of truth disclosed by the actor, the gravity of the sanctioned conduct, the degree of participation and responsibility, and the commitments made in terms of reparations of victims and guarantees of non-repetition (FARC-EP International, 2015). Furthermore, the aforementioned restraint of rights that is applicable to actors who comprehensively acknowledge the truth in the Chambers of Justice, can take on several concrete forms. As all of them are restorative and reparative in nature, such sanctions include (FARC-EP International, 2015):

- Activities in rural areas: reparation programs for displaced farmer peasants, programs for the construction and reparation of infrastructure, programs for the elimination of waste in

areas where this is necessary, programs for improvement of electrification and communication connectivity in agricultural areas, programs for substitution of illicit crop cultivation, programs for environmental recovery, and programs for the construction and improvement of road infrastructure needed for commercialization of agricultural products in zones of illicit crop substitution.

- Activities in urban areas: programs for the construction and reparation of infrastructure, programs for urban development, programs for accessing drinking water and the construction of sanitary networks and systems
- Activities in conflict affected areas: Clearance and eradication of explosive remnants of war, munitions, unexploded ordnance and antipersonnel landmines within national territory that has been affected by these devices.

5.2.2 Agreement on victims

The Special Jurisdiction for Peace, as described above, is part of the full agreement on victims, which was signed on December 16, 2015, at the negotiating table in Havana. Earlier, with the general agreement for the establishment of the peace talks, the Colombian government and the FARC-EP agreed upon the fact that the reparation of the victims had to be central in any agreement, and that the agenda for termination of the conflict therefore had to include the item of victims. With the signed agreement on victims, the parties established a framework for the reparation process.

The agreement on victims establishes a comprehensive system of truth, justice, reparation and non-repetition, with five central mechanisms:

1. *Commission for the clarification of truth, coexistence and non-repetition.* This truth commission will be a temporary and extra-judicial body that will be installed with the aim of fulfilling three fundamental goals: offering a broad explanation for the clarification of what happened, promoting and contributing to the acknowledgement of this legacy by victims, all actors and society as a whole, and promoting coexistence in the territories (FARC-EP International, 2015).

With regard to corporate accountability, the mandate of the commission offers various opportunities to acknowledge the role played by corporations. The agreement states that “the factors and conditions that contributed or facilitated the persistence of the conflict” have to be acknowledged. Furthermore, the development of the conflict has to be acknowledged, including the actuation of the State, of the guerillas, of paramilitary groups, and “the involvement of different sectors in society”. By doing this, the mandate stresses that the acknowledgement of the

phenomenon of 'paramilitarism' is an important task. In this way, its causes, origins and expressions within the conflict have to be acknowledged, but also "the organization and different ways of collaboration in the conflict, including its financing and the impact of such activities on the conflict". All in all, the commission must contribute to the building of a peace based on truth, knowledge and acknowledgement of a bloody past that has to be assumed in order to overcome it.

2. *Special Jurisdiction for Peace*. The second mechanism that is central in the comprehensive system of truth, justice, reparation and non-repetition is the Special Jurisdiction for Peace, as described in the previous paragraph. In addition to this, a unit for investigation and dismantling of criminal organizations will be established, including paramilitary organizations and their support networks.

3. *Special Unit for the search of missing persons in the context and due to the conflict*. This Special Unit will be established besides the other mechanisms with the aim of searching and locating all the missing persons who are alive, and in case of death, if possible, provide for the identification and dignified return of mortal remains of missing persons in the context and due to the armed conflict (FARC-EP International, 2015).

4. *Comprehensive reparation measures for peace-building*. This includes timely measures for the acknowledgement of the collective responsibilities of all actors who participated in the conflict for the damage caused and an appeal for forgiveness for what corresponds to each part, as an expression of willingness to contribute to a definitive 'never again' (FARC-EP International, 2015). In order to do so, collective reparation programs will be guaranteed with a restorative focus. Such programs include material and symbolic measures for addressing the harm, coexistence and reconciliation measures, action plans and participation mechanisms, as well as measures for psycho-social rehabilitation, collective return processes for enforced displaced persons, reparation of victims living abroad and land restitution measures. In order to fulfill these aims, existing reparation mechanisms will be strengthened and new measures will be adopted.

5. *Guarantees of non-repetition*. The guarantees of non-repetition, within this regard, have to be the result of the coordinated implementation of the measures and mechanisms above. Within such a perspective, according to the agreement, victims have to be recognized as citizens who had their rights violated, the harmful acts and gross human rights violations have to be recognized and rejected, impunity has to be fought, and coexistence has to be promoted (FARC-EP International, 2015).

All the elements within the comprehensive system of truth, coexistence and non-repetition are interconnected, with broad and genuine response to the rights of victims. As such, this system is a combination of judicial mechanisms that allow investigation and punishment of serious human rights violations as established by the Special Jurisdiction for Peace, with extra-judicial mechanisms

to clarify the truth, to search for missing persons, and repair the damage caused to individuals, groups and entire territories. Within the comprehensive system, special emphasis is placed on restorative justice, which ensures that justice is not only achieved through retributive sanctions, but also by remedial measures. Furthermore, legal securities will be provided for those benefiting from the justice measures. Ultimately, the overarching goals of the system contain: satisfaction of victims' rights; accountability to all participants; non-repetition; applying a territorial, gender and differential approach; legal security; coexistence and reconciliation, by building trust through the acknowledgement of victims, recognition and establishment of responsibilities by all actors, and acknowledgement by society as a whole of the need to seize this opportunity; legitimacy, by responding to its expectations and obligations (FARC-EP International, 2015).

5.2.3 Devil is in the details

By establishing the agreements on Transitional Justice and Victims Compensation, Colombia seems to be on track for creating a well-developed framework for addressing justice for all crimes committed within the conflict. It isn't surprising that the agreements have led to considerable excitement, as they seek to avoid impunity and try to provide justice for all those harmed. However, as we should be aware of, the test is not whether the negotiating parties in the Colombian peace process talk enough to get a deal done, but whether justice is actually provided. A closer look at the agreements show the complexities and difficulties with which the Colombian transitional justice context has to cope.

As one of the major aims of the signed agreements is to apply a victim-centered approach, by upholding and acknowledging victims' rights and repair the harm done to them, it is of crucial importance to respond to the victims' needs and views towards justice and reparation. As recent research by Bueno (2013) shows, victims within the Colombian conflict live victimization in different ways. Likewise, the issue of reparation also varies from victim to victim. Whereas victims of displacement often would like to obtain economic measures to find the dignified life they lost, victims of kidnapping give less value to this and attach more value to acknowledgement and recognition of the guerilla's true colors (Bueno, 2013). As a result, the state has to preserve various means of reparation so that victims can participate in the reparation measures they regard necessary to themselves, and are not unwillingly obliged to other measures of reparation. As Bueno (2013, p. 234) finds, in general, "healing is best achieved when it is a joint enterprise, whether it is family, friends, a religious community, open dialogues with other victims or with the help of professionals, the experience is smoother with the help of others". In order to provide prompt, adequate and effective reparation, it is therefore of particular importance that victims' voices are to be heard.

What is more about these agreements, is that the specifics about how the process exactly

will be carried out, are not yet completely known. Hence, Human Rights Watch (2015) warns that despite the lofty rhetoric of victim-centeredness and accountability, the agreement reveals a tangle of ambiguities and loopholes that make these references seem, at best, an empty promise. Furthermore, the restorative nature of the sanctions for perpetrators of serious human rights violations who fully cooperate to unveil the truth about their harmful acts has been subject of criticism, because “no international tribunal has allowed convicted war criminals to evade prison for these types of serious crimes” (Human Rights Watch, 2015). On the contrary, lawyer Diego Martinez (in Whitney, 2015) thinks the current agreement reflects an exemplary model for the world, because it is an attempt to put an end to factors giving rise to social violence, the economic ones that fostered the war and the political ones that kept it going. The restorative system, in this regard, is being seen as the right model to clarify these various factors to guarantee that there will be no repetition.

With the agreements on Transitional Justice and Victim Compensation, clearly an important step is made towards ending the conflict. However, the tensions pertaining to justice, accountability, compromise, and political accommodation remain live and unsettled. As can be learned from other cases, the quality of justice delivered will depend even more on the process than on the quantity of information that it will produce (Seils, 2015). The participating actors in the Colombian transitional justice process will have to ensure that the jubiliations of a signed peace agreement won't be immediately muted by the difficulties of applying its terms. As can be learned from earlier cases, the challenge will not be the perfection of the deal, but the traction to implement it (Ní Aoláin, 2016). The devil is in the details, and it is therefore crucial how these details of the Colombian peace agreement will be conceived and translated into transitional justice policy.

6 Conclusion and recommendations

Previous experiences within transitional justice contexts show that it is not the question if corporations can become involved in the violations of human rights, rather it is the question if something can be done about it to provide such violations from happening within a country that is undergoing a transition from conflict or repression towards democracy and sustainable peace. As argued by Blankenberg (in South Centre, 2015, p. 12) "it is not the companies themselves, nor their size nor their reach [...] what makes transnational corporations subjects of potential concern. What makes them subject of potential concerns is the absence of countervailing power that can channel their productive capacities towards constructive collective outcomes". The consequences of this absence of countervailing power become particularly detrimental when looking at transitional justice contexts.

As can be concluded from the experiences in the Nuremberg Trials and the transitional processes of Liberia, South Africa, Timor-Leste and Argentina, transitional justice measures can be used to address corporate accountability for human rights violations. However, these cases show that they have been largely supportive in the documentation of the involvement of corporations in human rights violation, but hardly have contributed to providing effective remedy for victims and acknowledgement of the corporations about the adverse impacts of their activities. Truth commissions have been valuable in investigating and unveiling the patterns of corporate involvement in human rights violations during times of conflict or repression. In doing so, they have often submitted various remedial measures in order to provide redress for victims and hold corporations accountable to their involvement in harmful acts. However, these remedial measures have largely been ignored or put aside by the governments, in order to not hinder the corporations, which are a key source in economic growth, and to cherish the believed need of economic development to succeed in making a transition to sustainable peace.

Concluding from the explored cases within this study, it can be argued that the socioeconomic problems underlying periods of repression or conflict have largely persisted and these transitional societies still continue to deal with the consequences of this unaddressed legacy. Therefore, it seems to be evident that a transitional justice process should include addressing the economic dimension. Moreover, the growing attention and focus within the human rights sphere on non-state actors and binding obligations for corporations, further acknowledges the need to include addressing the economic factors and structures within a transitional justice process to adequately come to terms with the past.

Within such regard, Colombia is a compelling case, being the next country undergoing a transitional justice process in order to deal with the legacy of its decades-long internal armed conflict. As it is found, corporations in Colombia have been allegedly involved in aiding and abetting

the massive human rights violations committed during the last decades of the armed conflict. This involvement has been expressed mainly by the relationship between paramilitaries and corporations, which consisted of providing illegal armed forces with financial means and strategic information in order to secure their operations and activities. In this way, corporations have been part of the economic structures that can be seen as a driving force within the Colombian conflict. Therefore, it is of considerable importance that the economic dimensions within the conflict are addressed in the transitional justice process, and that complicit corporations will be assigned responsibilities to redress the harm suffered by victims. However, as has been shown by the studied cases, corporate accountability is still an underdeveloped topic within transitional justice processes. Hence, it is found that the experiences of past transitional justice processes, with holding corporations accountable for their complicity in human rights violations and consequently letting them provide effective redress for victims, serve more as cautionary tales than as genuine inspirations.

The central question throughout this research has been:

What are the roles and responsibilities of corporations within the Colombian transitional justice context?

The following conclusions, considerations and recommendations can be formulated to find an answer to this question. Although not explicitly including corporations within the signed agreements in the Colombian peace talks, the agreements offer various statements that point to the role and responsibilities of complicit corporations in the Colombian transitional justice process. For example, the transitional justice agreement stresses that everyone who directly or indirectly participated in conflict will fall under the jurisdiction of the Special Jurisdiction for Peace. Furthermore, the mandate of the truth commission contains, among others, investigating “the factors that contributed or facilitated the persistence of the conflict”, “the involvement of different sectors of society” and “the collaboration and financing of paramilitarism”. Additionally, the truth commission functions to establish public hearings in which the role of various sectors of society within the conflict, such as the economic or business sector, will be investigated. Concerning the reparation of victims, the negotiating parties have agreed that the National Government will take the necessary measures to promote participation in reparation programs with regard to all those directly and indirectly involved in the conflict. It is therefore clear that complicit corporations, who are indirectly involved in the Colombian conflict, have a responsibility to actively participate in the Colombian transitional justice program.

Considering the complexities of the roots of the conflict, its tremendous impact on the Colombian population, and the controversial issues for the negotiating parties, it has to be understood that concessions will be insurmountable within the Colombian peace process. However,

transparency might be a key factor for overcoming controversial aspects and establishing compromises. Compromises will become more easily acceptable when all actors actively participate within a transparent transitional justice process. Corporations, therefore, cannot remain indifferent.

As a conclusion, several recommendations can be made with regard to the roles and responsibilities of corporations in the Colombian transitional justice process:

To the Corporations:

- Take an *active stance* in the Colombian transitional justice process, as it aims to develop a durable peaceful situation throughout the whole country that is only achieved when all sectors of society work together in a coordinated manner. After all, such a situation is necessary to protect and stimulate your economic activities in a proper way.
- When involved in the conflict, in any way, be *transparent* about your past activities and *recognize* the truth in the Chambers of justice, as all parties involved in the conflict will be subject to thorough investigation. Moreover, it is the only right thing to do in accordance with the *responsibility to respect human rights*, as outlined in the UN Guiding Principles for Business and Human Rights.
- *Acknowledge* your role in the conflict and the adverse impact of it on the victims of the conflict, and as a consequence, *take part in any reparative measures* that will be established by the comprehensive system of truth, justice, reparation and non-repetition.
- By taking in mind the state's incapacity to provide security during the conflict, a possible reparation method could include the establishment of a *fund* by the state and corporations, with the aim of fully contributing to the restorative measures for upholding victims' rights.
- Provide a *formal apology* to the victims, as this may be even more valuable to the victims in order to bring closure to the past and rebuild trust in a peaceful society.

To the National Government:

- Provide a transitional justice process which includes *all actors* involved in the Colombian internal armed conflict. By doing so, ensure the *accountability* of all actors being responsible for the human rights violations and the *satisfaction* of all victims' rights.
- Take into consideration the importance of *transparency* in the transitional justice process, both *internal and external*, in order to ensure the interconnectedness of all transitional justice measures, as well as to inform victims and the whole Colombian society on the progress made in the process.

- Take into account the role played by corporations, and include the *economic sector* in the investigation of the truth commission and include the *business sector* in the to be established sector hearings. This is especially important because of the relationship of these sectors with paramilitaries, as outlined in this research. The recent judgment in the Chiquita case can be of critical importance to unveil the specifics of this relationship.
- Provide *follow up* mechanisms to effectively implement the recommendations made by the truth commission and other transitional justice mechanisms.

To the International Community:

- Support the Colombian transitional justice process and provide assistance to ensure the *independence* within the allocation of judges, lawyers, and investigators in the comprehensive system of truth, justice, reparation and non-repetition.
- *Continue* the work on a legally binding instrument on corporate accountability to ensure that corporations will not perpetrate human rights when carrying out their operations and activities anywhere in the world. Furthermore, *develop* a section on transitional justice contexts or conflict affected societies, as may be clear that such contexts are especially vulnerable to corporate related human rights abuses.

The Colombian peace agreement, with its elements grounded in restorative justice, has to be conceived as a courageous effort to resettle the trust throughout the whole Colombian society, to deal with the legacy of a bloody past, and to work jointly towards sustainable peace. Rather than criticizing the agreement for its lack of retributive sanctions, it will be essential for negotiators and policymakers to avoid repeating the mistake of creating a framework that is ambitious on paper, but struggles to uphold victims' rights in practice. Therefore, it will be of crucial importance to fully utilize the restorative measures in order to clarify the social, economic and political factors that are inherent to the conflict and to live up to victims' rights and their sense of justice. Despite the need of their active participation in the various transitional justice measures, it might be even more valuable to victims if complicit corporations acknowledge their wrongdoings and issue an official apology towards the victims.

It is important to note that, although the establishment of the peace agreement is an impressive milestone that shows the willingness to jointly work on 'the new Colombia', sustainable peace is yet to be achieved. The peace agreement has to be conceived as the commitment to a long-term challenge that still lies ahead for the Colombians. Effectively accomplishing the transitional justice process requires the active participation of all actors involved in the conflict and the adequate anticipation to the post-conflict risks that will come along the road. When succeeding, the Colombian

transitional justice model can become an exemplary model for providing a comprehensive framework on transitional justice, with inclusion of the economic dimension and the role and responsibilities of corporations that have been largely missing in past experiences.

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