



**Unfinished Business: Corporate accountability and ESCRs in transitional justice processes.**

PhD submitted by Laura García Martín

Supervisors: Profa. Dra. Carmen Márquez Carrasco and Prof. Dr. Wouter Vandenhole

Sevilla- Antwerpen, June 2018.

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‘El derecho sirve para la vida o no sirve para nada’  
Legaz y Lacambra.

**A la memoria de mi abuela Valle,  
su alegría, su fuerza y su entusiasmo vivirán siempre en mí.**

## ACKNOWLEDGEMENTS

Anyone might think that writing the acknowledgments is the easiest part of the thesis. However, it seems to me quite difficult to condense in a couple of paragraphs the immense gratitude I owe to all those who, in one way or another way, have contributed to develop this project.

This thesis would not have been certainly possible without the continuous support and encouragement of my two supervisors, Professor Carmen Márquez Carrasco and Professor Wouter Vandenhoele. They believed in me and in my project since its early stages and provided me constant intellectual guidance throughout the whole process. I will never be able to express my gratitude to them.

I am also grateful to Professor Olga Martín Ortega and Professor Stephan Parmentier, who helped me to ground my thoughts when all that I knew was that I wanted to work on ‘private sector and peace issues’. I extend my gratitude to the whole Department of International Public Law and International Relations at University of Seville for making me feel part of it all these years. I am also very grateful to the Law and Development Research group at University of Antwerp for always welcoming and treating me as being at home.

I was fortunate to meet many altruistic and welcoming people during my fieldwork in Argentina. Professor Gustavo Beade, who rapidly accepted my application as a visiting scholar and who gave me the opportunity to present my ideas in an organised seminar. Professor Victoria Basualdo, Professor Maria Laura Böhm and Professor Marcelo Ferreira, who always found time in their tight schedule to discuss with me about history, politics and law. I am also grateful to all those I interviewed, accepting and receiving me to tell me their stories and experiences. Thank you all for making my experience in Argentina unforgettable.

I want to thank my close friends and my doctoral colleagues who have always listened, grounded and supported me in ‘crisis times’. Amongst all them, Inés deserves a special mention for being there for me since we were three. Having such kind and

great people surrounding me makes me feel very lucky. Certainly, you are the family that I have chosen.

I feel also very lucky of having a family who loves me wholeheartedly. My grandparents, who taught me what is really important in life, thank you for being such compassionate and loving persons. My mother and my father have shown me how to be dedicated and hardworking while helping me to become a better person. Mum and dad, I owe all I am to you. Thank you for believe in me more than myself and encouraging and supporting me unconditionally. My little brother Pablo, who has grown into a kind and young man, thank you for being my confidant and for making me always smile with Blacky after a hard day. I will always be such a proud older sister. Finally, Antonio, thank you for being always there for me, for lovingly listening me endlessly talking about my work and cheering me on every step of the process. I could not have imagined a better partner in life. It seems quite clear now that the journey has been as important as the outcome...

## **Abstract**

While corporations often develop their activities in territories affected by conflict or authoritarianism, human rights abuses in which companies are involved in such contexts are not usually conceptualised as part of transitional justice programmes. Instead, transitional justice has been traditionally focused only on State-sponsored violence. Similarly, transitional justice programmes have ignored violations of economic, social and cultural rights, largely focusing on breaches of civil and political rights and bodily integrity violations. Given that economic actors, such as multinational corporations, gather more power and strength and the division between State and non-State actors under international law is eroded, transitional justice is being forced to address corporate-related human rights violations. Furthermore, recognising the role of all actors and the whole spectrum of human rights violated in such contexts is crucial to properly address the root causes of violence and conflict, as well as to contribute to sustainable and positive peace.

This thesis explores theoretical and practical challenges of including corporate accountability for human rights abuses in transitional justice processes, as well as discussing the suitability of addressing economic, social and cultural rights violations within the existing transitional justice mechanisms. Finally, this work aims to provide a critical assessment on those issues through the lens of a real case study: the Argentinian transitional justice process.

## **Resumen**

Es común que las corporaciones desarrollen sus actividades en territorios afectados por conflictos o regimenes autoritarios. Sin embargo, los abusos contra los derechos humanos en los que las empresas están involucradas en tales contextos, no se conceptualizan generalmente como parte de los programas de justicia transicional. Tradicionalmente, dichos programas han concentrado sus esfuerzos en las violaciones causadas por los Estados. Asimismo, la justicia de transición históricamente no ha prestado atención a las violaciones de los derechos económicos, sociales y culturales, centrándose principalmente en abusos de los derechos civiles y políticos y en

violaciones relacionadas con la integridad física. Dado que los actores económicos, como las corporaciones multinacionales, gozan en la actualidad de mucho poder e influencia, y la división entre actores estatales y no estatales bajo el derecho internacional está siendo erosionada por este motivo, resulta oportuno y necesario que la justicia de transición aborde las violaciones de los derechos humanos en las que las empresas están involucradas. Además, reconocer el papel de todos los actores y el espectro completo de los derechos humanos violados en tales contextos resulta crucial para examinar de manera adecuada las causas profundas de los conflictos, así como para contribuir a una paz positiva y sostenible.

Esta tesis explora los desafíos teóricos y prácticos de incluir la rendición de cuentas a las empresas por abusos de los derechos humanos en los procesos de justicia transicional, así como examina la idoneidad de abordar las violaciones de los derechos económicos, sociales y culturales con los mecanismos de justicia de transición existentes. Por último, este trabajo tiene como objetivo proporcionar una evaluación crítica sobre dichos temas a través de un caso de estudio real: el proceso de justicia transicional en Argentina.

### **Abstract**

Bedrijven ontplooiën vaak hun activiteiten in gebieden die zijn getroffen door conflicten of waar autoritaire regimes heersen. Toch worden mensenrechtenschendingen door bedrijven in dergelijke contexten zelden geconceptualiseerd als onderdeel van transitional justice programma's. Traditioneel zijn transitional justice programma's enkel gericht op door de staat ondersteund geweld. Tegelijkertijd hebben transitional justice programma's schendingen van economische, sociale en culturele rechten veeleer links laten liggen en zich grotendeels gefocust op schendingen van burger- en politieke rechten en schendingen van de lichamelijke integriteit. Gezien economische actoren zoals multinationale ondernemingen meer macht en invloed verkrijgen en de scheiding tussen Statelijke en niet-Statelijke actoren onder internationaal recht wordt uitgehouden, wordt het veld van transitional justice gedwongen om zich ook te richten op bedrijfsgerelateerde mensenrechtenschendingen. Bovendien is het cruciaal om de rol van alle actoren en het hele spectrum van geschonden mensenrechten in dergelijke



contexten te erkennen om de grondoorzaken van geweld en conflicten grondig aan te kunnen pakken en bij te dragen aan duurzame en positieve vrede.

Dit proefschrift onderzoekt de theoretische en praktische uitdagingen om verantwoording door bedrijven voor mensenrechtenschendingen te integreren in transitional justice processen, alsook bespreek het de geschiktheid van de bestaande transitional justice mechanismen voor het behandelen van economische, sociale en culturele schendingen. Tot slot, beoogt dit werk een kritische beoordeling van deze uitdagingen te maken aan de hand van een case study over het Argentijnse transitional justice proces.

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Annex 1- List of interviews

## LIST OF ABBREVIATIONS

AI	Amnesty International
ACHR	American Convention on Human Rights
ATS	Aliens Tort Statute
CELS	Centro de Estudios Legales y Sociales
CESCR	UN Committee on Economic, Social and Cultural Rights
CONADEP	Comisión Nacional sobre la Desaparición de Personas
CDC	Clandestine Detention Centre
CPRs	Civil and Political Rights
CSR	Corporate Social Responsibility
DDR	Disarmament, demobilization and reintegration
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESCRs	Economic, social and cultural rights.
ESMA	Escuela de mecánica naval
EU	European Union
HROs	Human Rights organisations
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	The International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICJ	International Court of Justice
ICJs	International Commission of Jurists
ICRC	International Committee of the Red Cross
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ILO	International Labour Organisation
OECD	Organization for Economic Co-operation and Development
OHCHR	United Nations Office of the High Commissioner on Human Rights
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
SSR	Security sector reform
TJ	Transitional Justice
TRCs	Truth and Reconciliation Commissions
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN ECOSOC	United Nations Economic and Social Council
UN Framework	UN Protect, Respect, Remedy Framework
UN HRC	UN Human Rights Council

UN WG	United Nations Working Group on Business and Human Rights
UNGA	United Nations General Assembly
UNGP	UN Guiding Principles on Business and Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNSG	United Nations Secretary General

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# INTRODUCTION

## Background

Countries affected by armed conflict and authoritarian regimes have frequently suffered from gross human rights violations. On their road to achieve positive peace afterwards, States usually pass through a period of *transition* in which political and social changes take place, so the rule of law, democracy, and human rights protection and respect can flourish. These achievements would also definitely contribute to protecting international peace and security. In such contexts, transitional justice comes into play.

The focus of transitional justice has progressively expanded from human rights accountability in democratic transitions to a broader conception of transition, involving a variety of legal regimes, mechanisms and justice theories. While the field of transitional justice now constitutes a set of studies that involve a wide range of disciplines,<sup>1</sup> its primary goal is still to address the legacies of past violence and human rights abuses and contribute to reconciliation through accountability.<sup>2</sup> Transitional justice strategies were not originally conceived as a tool to achieve peace, but rather they were designed to stabilise social relations.<sup>3</sup> However, this does not mean that they did not contribute to peace processes.<sup>4</sup> Indeed, the aims of transitional justice have shifted from their earlier accountability goal to the goal of building and preserving peace.<sup>5</sup> Therefore, it has been shown that transitional justice possesses *peacebuilding*

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<sup>1</sup> Such as law, anthropology, political science, development studies, economics, education, ethics, history, philosophy, psychology and sociology. See for instance Bell, C., 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'', *The International Journal of Transitional Justice*, vol. 3, issue 1, 2009, pp.5–27.

<sup>2</sup> See for instance, Freeman, M., 'Transitional Justice: Fundamental Goals and Unavoidable Complications', *Manitoba Law Journal*, vol. 28, no.1, 2000, pp. 114-116; Roht-Arriaza, N. and Mariezcurrena, J., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge University Press, 2006, p.2.

<sup>3</sup> De Grieff, P., 'Algunas reflexiones acerca del desarrollo de la Justicia Transicional', *Anuario de Derechos Humanos, Centro de Derechos Humanos de la Facultad de Derecho de la Universidad de Chile*, 2011, pp. 39.

<sup>4</sup> In fact, there is no long-term sustainable peace that does not redeem claims of justice. *Ibid.*

<sup>5</sup> See Teitel, R., *Transitional Justice Genealogy*, *Harvard Human Rights Journal*, 2003, vol. 16, p. 80.

*functions*.<sup>6</sup> Peacebuilding initiatives aim to promote sustainable peace and cover a wide range of multidimensional tasks, ranging from the disarming of warring factions to the rebuilding of political, social, economic, and judicial institutions.<sup>7</sup> While analysing the whole spectrum of peacebuilding measures is beyond the scope of this thesis, this author assumes that transitional justice initiatives can be framed within the general field of peacebuilding. Therefore, the final and long-term aim of transitional justice would be facilitating the road to achieve sustainable and positive peace.

According to Galtung, the notion of positive peace implies not only the absence of violence, but also the restoration of relationships, the creation of social systems which cover the needs of the population and the constructive resolution of conflicts.<sup>8</sup> The goal for positive peace is, therefore, to address deeply rooted causes of conflict so that conditions for violent conflict would be resolved.<sup>9</sup> Consequently, transitional justice strategies should address the root causes of conflict or repression and, to this end, it is fundamental to consider the role of all actors, as well as the whole spectrum of human rights violations committed.<sup>10</sup>

Corporations often operate in countries affected by conflict or repression. However, their involvement in human rights violations has not been usually conceptualised as part of transitional justice.<sup>11</sup> This is largely explained by the fact that

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<sup>6</sup> See for instance, Sriram, C.L., García-Godos, J., Herman, J., and Martín-Ortega, O., *Transitional Justice and Peacebuilding on the Ground. Victims and Ex-combatants*, Routledge, 2013. See also, Peacebuilding initiative, 'Transitional Justice: Transitional Justice & Peacebuilding Processes', 3 February 2009. Available at [http://www.peacebuildinginitiative.org/indexf0e6.html?pageId=1883#\\_ftn55](http://www.peacebuildinginitiative.org/indexf0e6.html?pageId=1883#_ftn55), accessed 2 February 2018.

<sup>7</sup> See UN Peacebuilding Support Office, 'Peacebuilding & The United Nations. What Is Peacebuilding?' <http://www.un.org/en/peacebuilding/pbso/pbun.shtml>, accessed 2 February 2018.

<sup>8</sup> Galtung differentiates between negative and positive peace, arguing that the first one simply refers to the absence of violence, as something negative/undesirable which has stopped. He also States that peace theory is intimately connected not only with conflict theory, but equally with development theory. See Galtung, J., *Theories of Peace. A Synthetic Approach to Peace Thinking*, International Peace Research Institute, 1967, pp. 12-17. Available at [https://www.transcend.org/files/Galtung\\_Book\\_unpub\\_Theories\\_of\\_Peace\\_A\\_Synthetic\\_Approach\\_to\\_P\\_eace\\_Thinking\\_1967.pdf](https://www.transcend.org/files/Galtung_Book_unpub_Theories_of_Peace_A_Synthetic_Approach_to_P_eace_Thinking_1967.pdf), accessed 2 February 2018. See also for a brief analysis Galtung, J., 'Violence, Peace, and Peace Research', in *Journal of Peace Research*, vol. 6, no. 3, 1969, pp. 167-191.

<sup>9</sup> See for instance, Sandole, D. J. D., 'Typology', in Cheldelin, S., Druckman, D. and Fast, L. (Eds.), *Conflict: From Analysis to Intervention*, Continuum, 2003, pp.39-45.

<sup>10</sup> Including non-State actors such as corporations and ESCRs violations.

<sup>11</sup> Michalowski, S., 'Introduction', in Michalowski, S. (ed.), *Corporate Accountability in the Context of Transitional Justice*, Routledge, 2013, p.1

transitional justice has been traditionally focused on State-sponsored violence. Nevertheless, recognising the role of business in those situations of conflict and repression is crucial to properly address the root causes of violence and the possible links of complicity in human rights violations. Private economic actors, and particularly multinational corporations, today enjoy unprecedented power and influence and the division between State and non-State actors under international law is eroded. Consequently, transitional justice is being forced to address corporate-related human rights violations in such circumstances.<sup>12</sup>

Indeed, States are no longer the only actors involved in human rights violations, particularly in conflict-affected areas or countries under authoritarian regimes. These other non-State actors, including corporations, may operate in ways that significantly impact on individuals' enjoyment of human rights. However, abuses in which companies have been involved have frequently enjoyed impunity. Corporate accountability for human rights abuses has been left normatively undetermined at international level. Debates around whether to penalise the company's managers or directors or the corporation itself are still open. While individuals may be prosecuted and punished, this can have little effect on the corporate behaviour, which could continue its misconduct. Prosecuting individuals therefore may not deter the behaviour of the corporation as a whole. Conversely, prosecuting a corporation may not deter an individual's criminal conduct. Thus, although a parallel approach to this issue would be necessary, this author agrees with Ramasastry that penalising the company itself may provide a greater deterrent for corporations than the isolated prosecutions of individuals.<sup>13</sup> However, as this work specifically analyses in chapter three, holding corporations accountable is not easy task.

For the purpose of this thesis, the term 'accountability' refers to the general obligation to 'answer', implying the condition of being responsible for certain actions.<sup>14</sup>

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<sup>12</sup> *Ibid.* p.2.

<sup>13</sup> Ramasastry, A., 'Corporate Complicity: From Nuremberg to Rangoon –An examination of forced labor cases and their impact on the liability of Multinational Corporations', *Berkeley Journal of International Law*, vol. 20, issue I, 2004, p.96.

<sup>14</sup> See for instance, Noalkaemper, P.A., and Curtin, D., 'Conceptualizing Accountability in International and European Law', *Netherlands Yearbook of International Law*, vol. 36, no.1, 2005, pp. 3-20; Kool., R.S.B., '(Crime) Victims' Compensation: The Emergence of Convergence', *Utrecht Law Review*, vol. 10, no. 3, 2014, pp.14–26. However, as Brunée notes, 'notwithstanding its increasingly frequent invocation

Similarly, ‘responsibility’ is used throughout this chapter according to the meaning given to it in Public International Law. Thus, this work understands ‘responsibility’ as for a wrongful conduct according to international law on responsibility.<sup>15</sup> Consequently, responsibility refers to secondary norms through which corporations can be held accountable for breaches of the primary norms.<sup>16</sup> Likewise, the term ‘liability’ is used to refer to cases in which accountability for human rights abuses can be demanded by legal means, and therefore, litigated in the corresponding courts.<sup>17</sup>

Progressive developments in the field of business and human rights, such as the adoption in 2011 of the UN Guiding Principles, are increasingly addressing corporate accountability concerns. In fact, the UNGPs recognised that corporations are more likely to be involved in human rights violations in those high-risk situations, although they do not specifically refer to transitional justice processes. As pointed out by Sandoval and others, the UNGPs provide a window of opportunity for linking corporate accountability with transitional justice.<sup>18</sup> Furthermore, with the endorsement of the UNGPs, the Council provided the first authoritative guidance on how companies should meet their human rights responsibilities. In conflict settings, the UNGPs (Principle 7) recommend a high standard of care because of the greater risks, which is intimately connected to States’ duty to protect.<sup>19</sup> However, it is precisely under armed conflicts that States may be unable to provide a high level of protection, generally due to the lack of effective control of the territory. Equally, gross human rights violations do occur in the contexts of oppressive and authoritarian regimes, where many challenges also arise regarding corporate accountability.

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by international lawyers, the concept of “accountability” has not acquired a clearly defined legal meaning’. Brunnée, J., ‘International legal accountability through the lens of the laws of State responsibility’, *Netherlands Yearbook of International Law*, vol. 36, no.1, 2005, p.22.

<sup>15</sup> *Responsibility* thus primarily refers to the substantive aspect of having to act diligently.

<sup>16</sup> By contrast, the term ‘obligation’ refers to the primary norms by which actors are legally bound.

<sup>17</sup> This term will be mainly used at section 3 of this chapter, regarding domestic criminal law and civil law of remedies regimes. attaching legal consequences to unlawful behaviour, thereby implying a legal obligation to provide for redress

<sup>18</sup> Sandoval, C., Filipini, L., Vidal, R., ‘Linking Transitional Justice and Corporate Accountability’, in Michalowski, S. (ed.), *Corporate Accountability in the Context of Transitional Justice*, *op. cit.*, p. 25.

<sup>19</sup> Mares, R., ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *Nordic Journal of International law*, vol. 83, no. 3, 2014, p.298.

This thesis will not discuss or refute the central and primary role of States as subjects of international law and as key actors in transitional justice processes. However, this study seeks to find cross-cutting elements of corporate accountability for human rights violations and transitional justice, looking for the common ground in which both areas could work connected. In this sense, although international attempts to regulate corporate activities have been primarily focused on multinationals/transnational companies,<sup>20</sup> this thesis will use the concept of corporations in a general and broad manner, without distinctions regarding their size or whether they operate at the national or transnational level, or are State or privately owned. Given that corporations are not primary subjects of Public International Law, they originally can only be considered as accomplices of human rights violations, as only States are primary subjects of Public International Law. Thus, corporate involvement in violations of international human rights law is generally categorised as complicity.<sup>21</sup> In addition, this author departs from the premise that every single transition is unique and shaped by its particular political and social context. While past measures and mechanisms could inspire and be used in future transitional justice processes, they will finally have to be tailored to the specific country in which they operate. Otherwise, the effectiveness of transitional justice mechanisms would be probably undermined by the different and specific situations which they could be dealing with.

The economic and social dimension of transitional justice has been largely ignored in favour of traditional emphasis on violations of civil and political rights. Socioeconomic elements of conflict or authoritarianism have been traditionally

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<sup>20</sup> Multinationals or transnational corporations are characterised by being based or registered in one country but having affiliates or doing business in other countries, so they have a transnational character in their operations. In fact, the UN Human Rights Council resolution to elaborate an international binding instrument is intended to regulate this sort of business entities. See Human Rights Council, A/HRC/26/L.22/Rev.1, 25 June 2014, p.1, footnote 1. Available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement> accessed 2 February 2018.

<sup>21</sup> Some authors, such as Clapham, argue that non-State actors do already have international human rights obligations, but there is still a lack of academic consensus. See for instance, Clapham, A., *Human Rights Obligations of Non State Actors*, Oxford University Press, 2006; Clapham, A., 'Human Rights Obligations for Non-State-Actors: Where are we now?' in Lafontaine, F., and Larocque, F., *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, Intersentia, 2017.

relegated to the background issues.<sup>22</sup> Socioeconomic grievances however often appear as relevant aspects to the past violent dynamics, so considering them can potentially provide a deeper understanding of the root causes of conflict, as well as helping to reduce the chances of recurrence in the future.<sup>23</sup> While early transitional justice processes mainly focused on criminal prosecutions for bodily integrity violations, it has been shown/demonstrated that these violations of civil and political rights (herein CPRs) are intrinsically linked to violations of economic, social, and cultural rights (herein ESCRs).<sup>24</sup> Indeed, the consequences of the latter violations can be infringements on the most basic rights, such as the right to life. Thus, paying attention to these elements would be desirable for accountability purposes and to achieve a sustainable peace. Furthermore, as corporations' main domain of activity is economic, it cannot be denied that there are essential links between their activities and the enjoyment of ESCRs.

While using the abbreviation of the usual grouping of economic, social and cultural rights (ESCRs), this study's primary focus is on economic and social rights violations. This author is aware of the indivisibility of human rights, including ESCRs. However, this approach is based on the assumption that economic and social rights are most closely aligned to projects of development and they are consequently, often argued

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<sup>22</sup> See for instance, Sharp, D.N., 'Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice', *Fordham International Law Journal*, vol.35, 2012, p. 780; Calvet Martinez, E., 'La exigibilidad de los derechos económicos, sociales y culturales en situaciones de post-conflicto y en procesos de justicia transicional', in Bonet Pérez, J. and Alija Fernández, R.A., *La exigibilidad de los derechos económicos, sociales y culturales en la Sociedad Internacional del siglo XXI: una aproximación jurídica desde el Derecho internacional*, Marcial Pons, 2016, p.199.

<sup>23</sup> Indeed, many conflicts and dictatorial regimes are often fueled by socioeconomic injustices, and frequently involve ESCRs violations. Szoke-Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *op. cit.*, p.469-470: see also Muñoz Nogal, E. and Gómez Isa, F., '¡Pan, Libertad, Justicia Social! Las revueltas populares de Túnez y Egipto y la defensa de derechos económicos y sociales', in Bonet Pérez, J. and Alija Fernández, R.A., *La exigibilidad de los derechos económicos, sociales y culturales en la Sociedad Internacional del siglo XXI: una aproximación jurídica desde el Derecho internacional*, *op.cit.* pp.219-241.

<sup>24</sup> Arbour, L., 'Economic and social justice for societies in transition', Second Annual Transitional Justice Lecture hosted by the Center for Human Rights and Global Justice at New York University School of Law and the International Centre for Transitional Justice. New York University Law School, 25 October, 2016. p.4. A transcription of her speech can be found at [http://chrgj.org/wp-content/uploads/2012/07/WPS\\_NYU\\_CHRGJ\\_Arbour\\_-Final.pdf](http://chrgj.org/wp-content/uploads/2012/07/WPS_NYU_CHRGJ_Arbour_-Final.pdf) accessed 3 February 2018.

to be outside the bounds of transitional justice.<sup>25</sup> This thesis seeks to review, analyse and find out the suitability of such arguments.

Economic and social conditions are frequently linked to human rights abuses, often constituting a cause, means and/or consequence of conflict and authoritarianism.<sup>26</sup> Similarly, the economic legacy of authoritarian regimes and conflict-ridden societies will obviously influence the chances of establishing a stable democracy afterwards. As Hecht and Michalowski noted, economic stability might play an important role for the success of transitional justice.<sup>27</sup> Including the assessment of socioeconomic elements as well as ESCRs violations as an issue for transitional justice might serve the purpose of establishing a more comprehensive understanding of the root causes of past human rights violations, addressing, for instance, the potential links between economic actors (and even economic policies) and conflict or authoritarianism.

Although the notion of progressive realisation of ESCRs constitutes a key aspect of States' obligations in this field, not all the obligations regarding ESCRs are progressive. Instead, States also have immediate obligations.<sup>28</sup> In this sense, this work will take labour rights as reference of inclusion of ESCRs in transitional justice processes, particularly from the lens of specific labour rights, namely the right to form and join trade unions and the right to collective bargain. This selection is based on two main reasons: on the one hand, because State obligations with regard to these rights can be implemented immediately, so they are not originally subject to progressive

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<sup>25</sup> See for instance Schmid, E., and Nolan, A., 'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice', *The International Journal of Transitional Justice*, vol. 27, no. 3, 2014, pp. 362-382; see also Szoke-Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *Texas International Law Journal*, vol. 50, no. 3, 2015, p. 468.

<sup>26</sup> Hecht, L. and Michalowski, S., 'The Economic and Social Dimensions of Transitional Justice', Transitional Justice Network, 2012, p. 1. Full text Available at <https://www1.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf> accessed 3 February 2018.

<sup>27</sup> *Ibid.* p.4.

<sup>28</sup> The Committee has clearly claimed that States also have immediate obligations such as the obligation to take deliberate, targeted and concrete steps towards the realization of these rights, the prohibition of discrimination and the prohibition to adopt retrogressive measures. See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of the State parties' obligations, paras. 1-5 and 10.

realisation,<sup>29</sup> and they do not require significant State investment or resources to allow their enjoyment; on the other, because labour rights are certainly the set of rights more affected by corporations' activities, due to the intrinsic relationship between labour and capital. As the primary domain of activity of companies is economic, links between their operations and the enjoyment of economic and social rights are hardly refutable. Undoubtedly, companies play a significant role in fostering economic progress, which is needed to bring prosperity and to avoid falling back into instability and, eventually, conflict. However, this cannot be a reason to barter contribution to economic recovery with immunity from accountability. Transitional justice processes should establish mechanisms to discover and reveal the truth, in order to provide justice and reparations for victims of abuses to achieve social stability and peaceful societies. Therefore, addressing corporate accountability and ESCRs rights in transitional justice could potentially enhance and strengthen the pathway to positive peace.

### **Research questions and arguments**

Whereas corporate accountability and transitional justice have received significant academic and political attention lately, there is hardly any literature exploring the potential links between them. So far, a significant number of studies have addressed issues such as corporate human rights obligations and responsibilities,<sup>30</sup> but just a few studies are on the specific issue of corporate accountability in transitional justice contexts, as they have traditionally been studied separately.<sup>31</sup> The main purpose

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<sup>29</sup> See for instance, Committee on Economic Social and Cultural Rights General Comment No. 3, 14/12/90, *The nature of States parties obligations* (Art. 2, par.1). This comment identified steps that can be taken immediately for any level of resource availability. See also, Ssenyonjo, M., 'Reflections on State obligations with respect to economic, social and cultural rights in international human rights law', 2010, *The International Journal of Human Rights*, vol. 15, no. 6, p.971; OHCHR, 'Frequently asked questions on Economic, Social and Cultural Rights', Factsheet no.33, 2008, p. 15. Document available at <http://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf> accessed 4 February 2018. On the general notion of progressive realisation see Committee on Economic Social and Cultural Rights, General Comment No. 10, *The role of national human rights institutions in the protection of economic, social and cultural rights*, UN Document E/C.12/1998/25 (14 December 1998) para. 1.

<sup>30</sup> See for instance, Clapham, A., *Human Rights Obligations of Non State Actors*, Oxford University Press, 2006; Clapham, A., 'Human Rights Obligations for Non-State-Actors: Where are we now?' in Lafontaine, F., and Larocque, F., *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, Intersentia; Mares, R., 'Corporate and State responsibilities in conflict affected areas', *op. cit.*

<sup>31</sup> It should be highlighted the book edited by Sabine Michalowski, *Corporate Accountability in the Context of Transitional Justice*, Routledge, 2013. Articles of this book are the result of two international



of this thesis is to provide a critical assessment of the issue of corporate accountability and ESCRs in transitional justice processes, while exploring the potential key role of business actors in those contexts.

Following a legal and human rights based approach, this thesis aims to delimitate the theoretical and practical challenges of including corporate accountability in transitional justice processes through the existing mechanisms, as well as to provide specific conclusions to deal with those challenges and desirable outcomes. Similarly, this study would like to provide some reflections around the suitability of considering ESCRs violations in transitional justice processes, and how this can be effectively implemented. Conclusions drawn from this work could ideally be adapted and implemented in ongoing and future transitional justice processes.

The present study seeks to answer one central and primary question regarding the role of business entities under conflict or authoritarianism and how to properly address their involvement in human rights violations, particularly ESCRs violations, during the transitional justice process:

- How International Human Rights Law deals with corporate accountability and violations of ESCRs in transitional justice processes?

In order to provide an answer to the above-mentioned question, the study also addresses a number of secondary questions which tackle more detailed considerations:

- Are traditional transitional justice mechanisms able to address ESCRs violations and corporations' involvement? Does this inclusion imply rethinking and adapting the whole transitional justice paradigm?
- Could specific violations of ESCRs, such as labour rights, be addressed in transitional justice processes?

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seminars entitled 'Linking Corporate Complicity and Transitional Justice' which took place at the University of Essex (UK) in 2010 and University of Palermo (Argentina) in 2011.

- How can corporations be better held accountable for their role in human rights abuses when a country is making a transition from conflict or repression to peace and democracy? Through which mechanisms can corporate accountability be achieved?
- Do the remedies/reparations for corporate human rights abuses need to be adapted to the special circumstances of the transitional context?

Given that this study aims to tackle real life legal challenges, it analyses these questions through the lens of a real case study: the transitional justice process in Argentina. The inclusion of the case study will certainly provide a practical perspective of challenges and expectations derived from the theoretical analysis, as well as better illustrating how transitional processes can function in practice.

The original contribution of this work is three-fold. Firstly, connecting and expanding the framework of transitional justice to include corporate accountability for human rights abuses. Traditional studies of transitional justice have been focused on State-sponsored violence, so including corporations as relevant actors within transitional justice initiatives is an innovative approach.

Secondly, this thesis argues in favour of the inclusion of ESCRs in transitional justice processes. While this author agrees that pretending to include the whole spectrum of socioeconomic issues could undermine the field, including specific ESCRs violations would significantly and positively influence transitional processes. Which ESCRs should or should not be addressed will ultimately depend on the specific context and the capacities of the transitional justice mechanism concerned. This author concurs with those who argue that transitional justice can no longer ignore ESCRs violations.

Finally, this work aims to bring insights from the Spanish-speaking scholarly community to the English-speaking one, examining the evolution of the transitional justice process initiatives in Argentina from its early days to date. There are many studies analysing the transitional justice process in the country, but mainly from the perspective of political science, sociology and criminal law. The originality of this work is the focus on ESCRs violations and corporate involvement under the last Argentinian

dictatorship and how these issues have been dealt with during the transitional justice process. In addition, it provides an update of the recent initiatives and challenges adopted in the last stages of the transitional justice process in Argentina.

### **Argentina as case study**

The so-called *Proceso de Reorganización Nacional* was established in Argentina with the coup d'état of 24 March 1976 which overthrew the government of María Estela de Perón. It would remain in power from March 1976 to December 1983. Although the country has a long history of military interventionism in political life, this last regime had a particular characteristic which set it apart from all previous ones: the nature and magnitude of its violent repression. Inspired by the national security doctrine, State repression was employed to neutralize and exterminate the militant opposition while refounding a model of production based on the violent dispossession of workers.<sup>32</sup> Consequently, workers, and specifically their union representatives, were one of the main targets of State repression.

The pursuit of neo-liberal economic policies and austerity measures has been found to be closely linked to human rights violations,<sup>33</sup> workers and their trade union representatives being one of the main targets identified in most Latin American military regimes in the 1970s, and particularly in Argentina.<sup>34</sup> Repression in this sense was perpetrated in two main ways: through restrictive labour laws and practices, such as norms banning strikes and intervening trade unions,<sup>35</sup> which also affected the right to an

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<sup>32</sup> Verbitsky, H. and Bohoslavsky, V., 'Introduction', in Verbitsky, H. and Bohoslavsky, V (eds.), *The Economic accomplices to the Argentine dictatorship. Outstanding debts*, Cambridge University Press, 2016, p.8.

<sup>33</sup> On the other hand, orthodox communist practices such as those implemented in Cambodia under the last dictatorship showed a different way in which economic policies are directly involved in human rights violations. The Khmer Rouge regime nationalised all natural resources and implemented a high quota for food production, which led Cambodia to one of the worst famines in recent history. See Hecht, L. and Michalowski, S., 'The Economic and Social Dimensions of Transitional Justice', *op. cit.*, p. 3-4.

<sup>34</sup> See for instance, Pion-Berlin, D., 'Political Repression and Economic Doctrines: 'The case of Argentina'', *Comparative Political Studies*, vol.16, issue 1, p.43.

<sup>35</sup> Which also affected the right to an adequate standard of living. In fact, as consequence of the economic and repressive policies, workers' wages were 40% decreased and hours of work increased from 6 to 18, which has been considered as a new form of forced labour. See Conklin, M., and Davidson, D., 'The IMF and Economic and Social Human Rights: A case study of Argentina, 1958-1985', *Human Rights Quarterly*, vol. 8, 1986. p.256.

adequate standard of living; and through the so-called *State terrorism*,<sup>36</sup> by which workers and activists were arbitrarily arrested and were often the subject of forced disappearance. Today, these practices are considered responsible for a legacy that profoundly affected the development of workers and trade union movements in the subsequent years in Argentina. Suppression of rights and the disciplining of the working class were thus conceived as necessary means for imposing a distinctly neoliberal economic plan, committing massive human rights abuses on their way to achieve its objectives.

While the transitional justice process in Argentina has been already significantly documented, studies so far have been mainly focused on violations related to disappearances and other bodily integrity crimes committed by the State armed forces. It has been only recently that the attention was redirected to civil accomplices, particularly economic ones, which actively supported and benefited from the repressive regime. It has been shown that a pattern of collaboration existed between certain corporations and the repressive forces to exercise the repressive power against workers in the field of factories.<sup>37</sup> Only a few studies to date have addressed corporate involvement in the Argentinian dictatorship, mainly from the perspective of crimes against humanity.<sup>38</sup> That is the main reason why the present study aims to connect corporate accountability and transitional justice through the case study of Argentina, with a particular focus on violations of ESCRs, namely labour rights and the freedom of association in this context.<sup>39</sup>

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<sup>36</sup> Literature have used various terms to refer to State repression perpetrated in Argentina, such as ‘State terrorism’, ‘dirty war’ or ‘illegal repression’. All of them coincided and reflected the arbitrariness with which citizens were subjected to human rights violation, practised massively by the State. See *for instance*, IACtHR, *La Cantuta v. Peru*, 2006, para. 61 (c) (cf. the separate concurring opinion of Judge A.A. Cançado Trindade, para. 12); IACtHR *Goiburú et al. v. Paraguay*, 2006, paras. 66 and 72.

<sup>37</sup> ‘Responsabilidad empresarial en delitos de lesa humanidad. Represión a los trabajadores durante el terrorismo de Estado’, Tomo I y II, Editado por la Dirección Nacional del Sistema Argentino de Información Jurídica, 2015, p.2. Available at <http://flacso.org.ar/wp-content/uploads/2017/03/Responsabilidad-empresarial-en-delitos-de-lesa-humanidad-II.pdf> accessed 5 February 2018.

<sup>38</sup> *Ibid.*

<sup>39</sup> While freedom of association is expressly recognised in article 22 of the International Covenant on Civil and Political Rights (ICCPR), it is also within the ambit of article 8 of ICESCR (see also ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise). In the workplace context, this right is inextricably linked with the right to bargain collectively, as it ‘enables workers to negotiate better working conditions, such as safe and healthy working environments and living wages’.

Furthermore, the selection of Argentina as a case study responds both to theoretical and pragmatic reasons. Argentina is generally considered a regional and global protagonist in transitional justice. Since 2006 when criminal trials were reopened, more than 2,700 people have been charged with crimes against humanity and nearly 800 have been convicted.<sup>40</sup> Similarly, Argentina could be the paradigm of transitional justice innovation, specifically with regard to corporate complicity. To date, Argentina has used the largest set of mechanisms to examine the largest number of cases.<sup>41</sup> Initiatives in this respect still proliferated until 2015, such as the adoption of the law to create a Bicameral Commission to investigate economic and financial complicity with the dictatorship. What seems to be clear is that today it is not under discussion the actual existence of corporate complicity with the military regime, but rather how to properly articulate a collective response to the injustices perpetrated with that complicity and for the benefit of individuals or legal persons.

Given that the case study serves as basis to illustrate the theoretical framework and challenges examined in section I and II, it has not been included in the title of this thesis. Other relevant cases such as South Africa and Colombia were also considered as possible case studies. The selection of Argentina has not significantly changed the theoretical and conceptual framework of this thesis, but rather it has served to illustrate what is contained in those sections.

## **Research methodology**

The present study relies on a combination of various research methods. While desk-based research was the primary method of data collection, this work also integrates material collected from a field trip to Argentina which took place from 15 June to 15

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<sup>40</sup> See for instance, ‘Juicio a Ford Argentina por convertirse en centro de detención de la dictadura’, El País, 20 December 2017. Available at [https://elpais.com/internacional/2017/12/19/argentina/1513717354\\_408056.html](https://elpais.com/internacional/2017/12/19/argentina/1513717354_408056.html) accessed 3 February 2018. A full report on the status of proceedings see ‘Informe Estadístico sobre el Estado de las Causas por delitos de Lesa Humanidad en Argentina’, Procuraduría de crímenes contra la humanidad, 2017. Available at <http://www.fiscales.gob.ar/wp-content/uploads/2018/01/Lesa-Humanidad-Estado-de-las-Causas-2017.pdf> accessed 4 March 2018.

<sup>41</sup> Payne, L.A. and Pereira, G., ‘Accountability for Corporate Complicity in Human Rights Violations: Argentina’s Transitional Justice Innovation?’, in Verbitsky, H. and Bohoslavsky, J.P., *op. cit.*, p.36.

September 2017. Desk-based research was primarily used in order to identify and study relevant and updated literature in the field of transitional justice, corporate accountability and human rights law. Literature regarding the case study was mainly collected during the field trip as it is relatively difficult to access books solely published in Argentina -and in Spanish- in Europe.

Given that this thesis aims to explore the potential linkages between different fields, it was divided into four building blocks in order to deeply study each field before exploring possible connections. These building blocks facilitate and organise the analysis of the main subjects, namely ‘corporate accountability for human rights violations’, ‘transitional justice and ESCRs’, ‘labour rights as human rights’ and ‘Argentina as case study’. Building blocks were drafted in advance and separately as independent fields but always with the focus of the research questions. Once this first phase was completed, their contents were distributed and combined through the six chapters of this thesis.

While using literature from different disciplines and a flexible research-focus to provide a comprehensive approach to the topic, this research is predominantly legal in nature.<sup>42</sup> Adopting a multidisciplinary approach in this sense, intends to provide an overall and integral perspective of the subject, as well as to better respond to the research questions in an innovative and holistic way for legal scholarship. Therefore, whereas studying the field of corporate accountability and human rights mostly requires a legal approach, the area of transitional justice demands a more comprehensive approach, including legal and political sciences, sociological perspectives and even peace studies. Similarly, an inherent legal approach applies with regard to the ESCRs and the freedom of association from the labour perspective (trade unions), in order to identify and analyse the legal framework and the most representative case law related to the topic, both at international and regional level. Furthermore, this thesis includes approaches of other disciplines such as history, political science and international relations.

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<sup>42</sup> Particular legal focus is on Public International Law and International Human Rights Law.

Methodological techniques employed were again varied. Historical and sociological analyses were primarily carried out to establish the general framework of transitional justice and its evolution as a field within Public International Law. Similarly, dogmatic and exegetical techniques were used to delimitate legal boundaries of the transitional justice process and ESCRs. Furthermore, this work followed a systematic study of corporate accountability for human rights violations in order to address the issue of corporate accountability for human rights violations through the existing legal regimes. Ultimately, synthesis and deduction techniques were used to reach final conclusions and respond to the research questions of this thesis.

Through the desk-based research, this study builds the theoretical frameworks and the State of the art. In addition to primary sources of data such as the texts of international legal documents,<sup>43</sup> secondary sources have been also consulted such as works by scholars, reports from non-governmental organizations (NGOs) and governmental agencies, mainly accessed through the University of Seville and University of Antwerp Library.<sup>44</sup> Online resources such as the Social Sciences Research Network (SSRN) and Google Scholar were essential to this work. In addition, this author has been actively involved in different research projects and international seminars, as well as in relevant meetings whose thematic were related to this thesis.<sup>45</sup>

On the other hand, this work was also broadened with data gathered during a research stay of three months in Argentina.<sup>46</sup> The aim of this field work was, firstly, to access sources that were not available from Europe and secondly, to conduct semi-

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<sup>43</sup> *Inter alia*, International Treaties and Conventions, General Comments and case law from the human rights bodies.

<sup>44</sup> As part of the Joint PhD agreement, the candidate did two research stays at University of Antwerp, Faculty of Law from 5 May to 6 July 2016 and from 2 May to 2 September 2018.

<sup>45</sup> For instance, the researcher attended to UN Annual Forum on Business and Human Rights in Geneva, Switzerland (2016); three International Conferences on Business and Human Rights celebrated at University of Sevilla, Spain (2013, 2015 and 2016); GLOTHRO Research Network final Conference on transnational human rights obligations which took place in Turku, Finland (2014). The author has also taken part in a number of research projects such as 'Justicia Transicional, participación civil y delitos económicos. Límites y posibilidades en el marco del Estado de Derecho' at University of Buenos Aires, Argentina; or 'Implementation of the UNGPs on business and human rights by the European Union and its member States', University of Sevilla, Spain.

<sup>46</sup> Specifically at the Instituto de Investigaciones Jurídicas y Sociales 'Ambrosio L. Gioja', Faculty of Law, University of Buenos Aires.

structured interviews with relevant actors of the transitional justice process.<sup>47</sup> This qualitative method of research was considered useful to approach highly politicised and sensitive issues, such as those involved in addressing a violent past.<sup>48</sup> The main purpose of the interviews was to gain a deeper understanding of political, institutional and social dynamics of the transitional process in Argentina, as well as to interact with scholars there who worked in this field. It is important to note in this sense that the majority of relevant facts and data in the field have not been yet processed by the doctrine, so certain relevant information can only be reached by communicating directly with the protagonists. However, information collected through the interviews was not treated as hard evidence, but rather used to understand institutional initiatives and experiences of key informants who had dealt directly with the events being analysed in this thesis. Such a holistic approach to the case study has allowed the author to gain a deeper knowledge than one that can be provided by only employing primary and secondary sources.

### **Thesis outline**

This dissertation is divided into three sections, each one containing two chapters. The work's final structure is directly related to the methodology employed, as main sections correspond to three of the building blocks earlier mentioned.

Section one relates to Transitional justice and ESCRs. Since the field of transitional justice is very broad and complex, chapter one focuses on main justice theories and mechanisms while chapter two focuses on ESCRs, particularly labour rights, and its potential inclusion in transitional justice processes. Both chapters identify four main processes, namely 'truth', 'justice', 'reparations' and 'institutional reform'. Transitional justice mechanisms are analysed within the corresponding process where they belong according to their goals.

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<sup>47</sup> A detailed list of interviews can be found in the Annex I.

<sup>48</sup> See for instance, Yin, R.K., *Case study research. Design and methods*, Sage Publications. Applied Social Research Methods Series, vol. 5, Second Edition, 2009, p. 7-8.



Section two discusses the issue of corporate accountability in transitional justice contexts. Therefore, chapter three examines the general notion of corporate complicity for human rights abuses and how corporations can be held accountable for them through the existing legal regimes. Chapter four provides an analysis about how corporate accountability can be included in transitional justice processes, focusing on the economic and social aspects of transitions and the role of corporations during those processes. It also outlines the challenges of including corporations in transitional justice for the field of business and human rights, particularly within the framework of the UNGPs.

Section three deals with the case study to better illustrate theoretical frameworks analysed in previous sections. Chapter five provide an account of the historical, political, social and international context of Argentina's last dictatorship. It is argued that, within the backdrop of the Cold War, a blend of economic crisis, social unrest and polarisation, and extreme right and left-wing terrorism resulted in military regimes being responsible for massive human rights violations in most Latin-American countries, Argentina being one of them. This chapter also focuses on the corporate involvement and economic groups that directly supported and benefited from repressive State action. Chapter six provides an account of transitional justice in Argentina since its earliest stages in 1983. It is noted that three major phases can be distinguished, although a fourth and current stage can be added from 2015 to date (2018). Different phases and evolution of transitional justice policies have been closely related to the role of human rights organisations and the development of an international human rights doctrine, as well as the leaderships of different governments. Through those phases, Argentina used a wide range of mechanisms, including truth commissions, criminal prosecutions, and economic and symbolic reparations, to come to terms with its violent past.

Final conclusions return to the primary and secondary research questions, providing them with a response derived from the principal points analysed through this thesis.

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## **SECTION 1 – TRANSITIONAL JUSTICE AND ECONOMIC SOCIAL AND CULTURAL RIGHTS (ESCRs)**

### **I. CHAPTER ONE – Analysing the Transitional Justice paradigm**

#### **I.1 Introduction**

Societies affected by armed conflict and repressive regimes have frequently suffered from mass atrocities and gross human rights violations. In the road to achieve democracy and sustainable peace afterwards, States usually pass through a period of *transition* in which political and social changes take place in order to build systems where the rule of law, democracy, and human rights protection and respect can flourish. These achievements would clearly also contribute to protect international peace and security. In such contexts, transitional justice comes into play. As one of the most relevant fields among peacebuilding measures, it specifically helps to secure a stable democratic future and peace.<sup>49</sup>

There are many political and practical issues to be considered carefully when making a transition from a violent past, some of which come often into conflict with each other. For instance, the Spanish transition to democracy was so fragile after Franco's dictatorship that it adopted silence –for more than thirty years- for abuses committed during the civil war and the repressive regime.<sup>50</sup> Similarly, during the South African transitional process, De Klerk's National Party threatened civil war if the African National Congress insisted on war crime trials against apartheid officials.<sup>51</sup> As States coming out of conflict or repression usually face legacies of human rights abuses,

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<sup>49</sup> Studies have demonstrated that without peacebuilding measures, States tend to relapse into conflict within five years of the signing of a peace agreement. See for instance Collier, P. and Hoeffler, A., 'The Challenge of Reducing the Global Incidence of Civil War', *London Copenhagen Consensus Challenge Paper*, 2004.

<sup>50</sup> For more information about the Spanish transition, see for instance Rodríguez, J., *El derecho a la verdad en la justicia de transición española. Asociación Española para el Derecho Internacional de los Derechos Humanos*, Luarca, 2014.

<sup>51</sup> For more information about the South African process, see Graybill, L.S., *Truth and Reconciliation in South Africa: Miracle or Model?*, Lynne Rienner Publishers, 2002.

it is difficult within this environment to make choices about how to deal with past abuses while at the same time engaging in peacebuilding strategies. This tension is usually labelled as the ‘peace versus justice’ dilemma, which reflects how potentially conflictive the transitional justice goals can be.<sup>52</sup> Whereas perpetrators’ and accomplices’ accountability is crucial to fight against impunity and the perpetuation of the sense of injustice, deploying transitional justice mechanisms –such as truth-telling exercises or criminal processes- can jeopardize the fragile peace and democratic process.<sup>53</sup> Transitional justice processes also face policy and practical challenges stemming from the number of those implicated in past human rights abuses, which would surely overwhelm the *under-construction* judicial system in transition.<sup>54</sup> Indeed, successor regimes are often engaged in rebuilding political and judicial institutions, so processing such an important volume of cases associated with past abuses results in difficulty and high cost in terms of resources. Moreover, a transitional justice process which does not guarantee a minimum standard of due process is likely to be discredited or politicised.<sup>55</sup>

While minimalist conceptions of peace refer to the ‘absence of large scale, organized violence or war and the extremely low probability of the resumption of war,’<sup>56</sup> minimalist conceptions of reconciliation are linked to the principle of democratic reciprocity amongst conflicting parties.<sup>57</sup> Nevertheless, tolerance of political and ethnic diversity and respect for human rights has been also incorporated in more

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<sup>52</sup> See for instance, Freeman, M., *Necessary Evils: Amnesties and the Search for Justice*, Cambridge University Press, 2010. See also Teitel, R.G, Transitional Justice, *Harvard Human Rights Journal*, vol.16, 2003, pp. 78-85.

<sup>53</sup> Leebaw, B., ‘The Irreconcilable Goals of Transitional Justice’, *Human Rights Quarterly*, vol. 30, no. 1, 2008, pp. 100-101.

<sup>54</sup> *Ibid.* p.101.

<sup>55</sup> See for instance, Stan, L., and Nedelsky, N. (eds), *Encyclopedia of Transitional Justice*, Cambridge University Press, 2013, pp 112-279; see also ‘Peace versus justice? Understanding transitional justice in fragile States’, ODI public event, 2009. A Transcription and video available at: <https://www.odi.org/events/2043-peace-versus-justice-understanding-transitional-justice-fragile-States> accessed 5 March 2018.

<sup>56</sup> Mendeloff, D., ‘Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?’, *International Studies Review*, no. 6, 2004, pp.355- 363.

<sup>57</sup> See Gutmann, A. and Thompson, D., ‘The Moral Foundations of Truth Commissions’, in Rotberg, R. and Thompson, D. (eds.), *Truth v. Justice: The Morality of Truth Commissions*, Princeton University Press, 2000, pp. 22- 44.

expansive conceptions of both notions.<sup>58</sup> Ultimately, reconciliation encompasses not only the goals of stabilizing and legitimating the new State authority, but also the aspiration for a political community based on consent and shared norms.<sup>59</sup> This expanded notion of reconciliation, thus, has been at cross purposes with the goal of addressing accountability, promoting ongoing political reform, and the ongoing politics of memory. Additionally, although transitional justice processes aim to maintain some degree of order, they also pretend to advance political transformation.<sup>60</sup> In other words, transitional justice institutions challenge the legitimacy of former regime practices while simultaneously seeking to establish their own legitimacy, trying to minimise the challenge that they pose to dominant frameworks for the memory policies.<sup>61</sup>

The focus of transitional justice has progressively expanded from human rights accountability in democratic transitions to a broader conception of transition involving a variety of legal regimes and mechanisms. Nowadays, the field of transitional justice constitutes a set of studies that involve a wide range of disciplines, such as law, anthropology, political science, development studies, economics, education, ethics, history, philosophy, psychology and sociology.<sup>62</sup>

Both practice and literature on transitional justice have proliferated enormously in the past twenty years. Indeed, transitional justice is a relatively young field which has been initially driven by practice. The establishment of the International Center for Transitional Justice in 2001, and the growing interest amongst scholarship have increased the study in this relatively new field. While the early transitional justice literature was primarily law-focused and dealt mostly with criminal prosecutions of perpetrators and truth commissions, the emphasis has been recently placed on the role of victim reparations as well as on informal local justice initiatives. According to Miller, scholars have defined and classified the transitional justice field in three primary

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<sup>58</sup> See for instance, Gibson, J.L., 'Overcoming Apartheid: Can Truth Reconcile a Divided Nation?', *Politikon*, no. 31, vol. 2, 2004, pp. 129–155

<sup>59</sup> Leebaw, B., 'The Irreconcilable Goals of Transitional Justice', *op. cit.*, p.105.

<sup>60</sup> Teitel, R., *Transitional Justice*, Oxford University Press, 2000, pp.3-4.

<sup>61</sup> Leebaw, B., 'The Irreconcilable Goals of Transitional Justice', *op. cit.*, p. 97.

<sup>62</sup> See for instance, Bell, C., 'International Journal of Transitional Justice', *The International Journal of Transitional Justice*, vol. 3, issue 1, 2009, pp.5–27; See also Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Mieth, F., 'Transitional Justice Theories: An introduction', in Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Mieth, F. (Eds), *Transitional Justice Theories*, Routledge, 2014, p.2.

ways: (1) through its tools, instruments and institutions; (2) through a chronological assessment of either institutional development or the scholarship on the field; and (3) by elucidating versions of regime change that lead to an enactment of transitional justice. Likewise, as scholarship has approached transitional justice from different disciplines, there is a large number of scientific articles, books and practical factsheets dealing with elements and the process of transitional justice in different ways, varying from political theories to operational issues in the field.

This first chapter will focus on the conception and evolution of transitional justice, as well as the analysis of its processes and mechanisms. It will similarly consider that several elements, political variables and actors certainly influence the design and implementation of transitional justice strategies. Consequently, different approaches have been developed depending on the specific circumstances of each transitional process. The employment of diverse mechanisms reflects internal and international political, historical and sociocultural dynamics unique to each particular context. However, despite those differences, there are also many elements in common within transitional justice processes.

## **I.2 Background and evolution of Transitional Justice**

Most of literature locates the beginning of transitional justice in the post-Second World War Nuremberg and Tokyo military tribunals.<sup>63</sup> Teitel, for instance, provides a three-phase model for understanding the historical evolution of transitional justice: a first phase beginning in 1945; the second one took place during the last quarter of the 20th century, characterised by the collapse of the Soviet Union and significant economic and political changes in Latin America and Eastern Europe; and a third contemporary stage in which transitional justice ‘moves from the exception to the norm.’<sup>64</sup>

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<sup>63</sup> See for instance, Elster, J., *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, 2004. Or Bass, G., *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, 2000.

<sup>64</sup> Teitel, R.G., ‘Transitional Justice Genealogy,’ *op.cit.*, p. 70.

In 1945, allies ran the Nuremberg Trials, benefiting from the special international political conditions of the postwar period, which would not last long in the same manner. Consequently, this first stage of transitional justice ended soon after the war and was followed by an impasse on the issue during the period of the bipolar world of the Cold War.<sup>65</sup> Although short in time, this first phase was characterised by international war crimes trials and interState cooperation,<sup>66</sup> and contributed to developing modern human rights law.<sup>67</sup> Criminal accountability being the primary goal of transitional justice by that time meant that an important innovation in this phase was the extension of international criminal law beyond the State to the individual. Postwar transitional justice's legacy has been irrefutable in international law, where the accountability precedents for wartime abuses were enshrined in international conventions shortly after the war.<sup>68</sup> Indeed, the transitional justice model of this first phase was exported through 'legal transplants of international treaties and conventions'.<sup>69</sup>

The second phase of transitional justice took place over the last quarter of the twentieth century. It was characterised by a period of accelerated democratization and political fragmentation which has been so-called the 'third wave' of democratic transition.<sup>70</sup> The disintegration of the Soviet Union and the end of military rules in Southern Cone countries were followed by other transitions in Eastern Europe, Africa

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<sup>65</sup> *Ibid.*

<sup>66</sup> National justice was in this sense displaced by international justice. For an account see Battle, G., The Trials before the Leipsic Supreme Court of Germans Accused of War Crimes, *Virginia Law Review*, vol. 8, no. 1, 1921, pp. 1-26.

<sup>67</sup> See Steiner, H., and Alston, P., *International Human Rights in Context: Law, Politics and Morals*, Oxford University Press, 2000. On the impact of the Nuremberg trials see Teitel, R.G., 'Nuremberg and Its Legacy, Fifty Years Later', in Cooper, B. (ed.), *War Crimes: The legacy of Nuremberg*, TV Books, 1999, p. 44.

<sup>68</sup> Such as the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). For a discussion of the codification process of the International Law Commission, see Bassiouni, M. C., The History of the Draft Code of Crimes Against the Peace and Security of Mankind, in Bassiouni, M. C (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, *Nouvelles Etudes Penales* No. 11, Eres, 1993, p.11. For broader discussion on human rights post-war developments, see Teitel, R.G., 'Human Rights Genealogy', *Fordham Law Review*, vol. 66, issue 2, 1997, p. 301.

<sup>69</sup> Teitel, R.G., 'Transitional Justice Genealogy', *op. cit.*, p. 74

<sup>70</sup> See for instance, Huntington, S., 'The Third Wave: Democratization in the Late Twentieth Century', *Journal of Democracy*, vol.2, no.2, 1991.

and Central America.<sup>71</sup> These events evidenced how the United States and Soviet Union influenced and supported local and regional conflicts within a bipolar-world context.<sup>72</sup> Under this post-Cold War wave of transitions, the emerging model of transitional justice was based on nation-building, which however remained at cross purposes with broader conceptions of international justice.<sup>73</sup> Therefore, the first phase model of transitional justice was replaced at this stage with domestic trials and emphasis on the rule of law, thus attempting to legitimate the successor regime. Nevertheless, despite the lack of international trials, international legal norms contributed to providing consistency to the rule of law, as it was universally standardised at the Nuremberg model.<sup>74</sup>

In contrast with the first phase, legitimization of punishing human rights abuses was not simply assumed in this second phase. Conversely, tensions between punishment, amnesties and their contribution to build the rule of law were raised. This second wave of transitions revealed that what is just in such special circumstances had to be determined from the transitional process itself.<sup>75</sup> In fact, discussions on the notion of justice in transition are best understood when situated in the actual transitional political context. Therefore, the potential of criminal accountability impacts in transition will ultimately rely on the nature, origin and significance of past abuses.<sup>76</sup> Debates at this stage covered not only the question of accountability for past abuses but also how to heal and reconcile the entire society. Transitional justice in this phase became also associated with the more complex political conditions of nation-building.<sup>77</sup> These

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<sup>71</sup> See Popovski, E. and Serrano, M., *After Oppression: Transitional Justice in Latin America and Eastern Europe*, United Nations University Press, 2012, p. 1-17. On the discussion of the balance of power in Latin America see Schoultz, L., *National Security and United States Policy Towards Latin America*, Princeton University Press, 1987; see also Brown, C. (ed.), *With Friends Like These: The Americas Watch Report on Human Rights and U.S. Policy in Latin America*, Pantheon Books, 1985. On Central America see Lefeber, W., *Inevitable Revolutions: United States and Central America*, Norton & Company, 1984.

<sup>72</sup> It should be noted that the end of these political circumstances does not imply that such conflict has also ended, as there remain numerous interconnected insurgency movements, particularly in Latin American countries. See Schoultz, L., *National Security and United States Policy Towards Latin America*, *op. cit.*, pp. 112–204

<sup>73</sup> There are however exceptions in the turn to international justice regarding the conflicts in the Balkans and in Rwanda.

<sup>74</sup> Teitel, R.G., 'Transitional Justice Genealogy', *op. cit.*, p.76

<sup>75</sup> Teitel, R.G., *Transitional Justice*, *op. cit.*, p.234.

<sup>76</sup> Teitel, R.G., 'Transitional Justice Genealogy', *op. cit.*, p. 77.

<sup>77</sup> *Ibid.*



dilemmas were seriously taken into account in many countries when deciding their transitional strategy and considering putting into place alternative methods to face past violations.<sup>78</sup> Different conceptions of justice consequently emerged in this second phase, moving beyond simply retributive justice as understood in the first phase.<sup>79</sup>

Given that revealing the truth of past events was one of the main purposes of transitional justice in this phase, new institutional mechanisms emerged. The most significant one is the Truth and Reconciliation Commission (TRC), an official body whose primary task is to investigate and record past human rights abuses and root causes of conflict.<sup>80</sup> Transitional justice then was conceived also as form of dialogue between victims and perpetrators, often using TRCs as a vehicle to reconcile and recover from a violent past. Similarly, this sort of model and mechanisms combined the establishment of a historical record while at the same time leaving open the possibility of future judicial actions. Exceptional and limiting national political conditions were therefore thoughtfully considered in most of this second phase's transitions. However, while in this phase international justice was replaced by domestic mechanisms, this model did not ultimately prove to be suitable for later transitional justice processes, in which national and international factors became interdependent contributors to political change.<sup>81</sup>

The third phase of transitional justice is characterised by the expansion and normalisation of transitional justice.<sup>82</sup> International justice which developed in the postwar period recurs at this point but is transformed by new political contexts. Transitional justice has now extended beyond its historic role in regulating international conflict to regulate intrastate conflict as well as peacetime relations. Weak and fragile States, domestic conflicts, and political fragmentation are some of the common factors of this third and contemporary phase. Indeed, the key element of normalisation of transitional jurisprudence is the institutionalisation of the International Criminal Court

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<sup>78</sup> Such as truth-seeking mechanisms and alternative accountability initiatives. South Africa and Rwanda's transitional processes are good examples of that. See for instance, Van Zyl, P., 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission', 52 *Journal of International Affairs*, vol.52, 1999, p. 647; and Waldorf, L., 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice', *Temple Law Review*, vol. 79, no.1, 2006.

<sup>79</sup> Different theories are further analysed below in section I.5

<sup>80</sup> Truth Commissions are further analysed in section I.4.A

<sup>81</sup> Teitel, R.G., 'Transitional Justice Genealogy', *op. cit.*, p.78

<sup>82</sup> *Ibid.* p.89. See also Engbo Gissel, L., 'Contemporary Transitional Justice: Normalising a Politics of Exception', *Global Society*, vol. 31, no. 3, 2017, pp.353-369,

(ICC).<sup>83</sup> Preceded by the two *ad hoc* international criminal tribunals of the former Yugoslavia and Rwanda, the ICC reflects the consolidation of the first phase model: a permanent international court to investigate and prosecute the most egregious human rights abuses.<sup>84</sup>

Nowadays, the transitional justice conception of the global rule of law seems to be based on an expansion of the law of war,<sup>85</sup> as evidenced by the rise of humanitarian law.<sup>86</sup> In fact, transitional justice is increasingly understood as ordinary justice carried out in exceptional circumstances.<sup>87</sup> This normative expansion appears to enforce State respect for human rights. However, as Teitel notes, ‘this demonstrates the potential for sliding from a normalized transitional justice to the campaign against terrorism’.<sup>88</sup> The normalisation of contemporary transitional justice processes is also reflected in other significant aspects, such as the toleration of greater political discretion, and the rise of irregular procedures, all justified in humanitarian terms. Globalisation has certainly significantly contributed to this phenomenon. Today, conflation of human rights law, criminal law, and international humanitarian law, ‘implies a pronounced loss for those seeking to challenge State action’, particularly through the expanded use of law of war as a basis for intervention.<sup>89</sup> Accordingly, new human rights dilemmas are raised regarding the tension of main goals of transitional justice. Indeed, pursuing justice in such new political context irrefutably implies diverse conceptions of rule of law standards and principles. While this diversity could serve the varying aims of transitional justice processes, political conditions often exacerbate tension in adherence to these diverse rules.<sup>90</sup>

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<sup>83</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

<sup>84</sup> See Rome Statute, Preamble, at 1002 (‘the most serious crimes of concern to the international community as a whole must not go unpunished’).

<sup>85</sup> See United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, Annex 11, U.N. Doc. A/CONF. 183/9, reprinted in 37 I.L.M. 999 (1998).

<sup>86</sup> In contemporary conceptions, the consideration of humanitarian law also appears to expand the humanitarian regime to address broader aspects of the law of war, including the justification of its possible initiation.

<sup>87</sup> Engbo Gissel, L., ‘Contemporary Transitional Justice: Normalising a Politics of Exception’, *op. cit.*, p354.

<sup>88</sup> Teitel notes that any attempt to generalise from exceptional post-conflict situations becomes extremely problematic. Teitel, R.G., ‘Transitional Justice Genealogy’, *op. cit.*, p. 91.

<sup>89</sup> *Ibid.*

<sup>90</sup> While the United States has for instance long emphasised domestic and local processes and accountability, European countries have tended to prefer multilateralism and UN affiliated trials, such as

In summary, transitional justice is an important field which has experienced different phases and changes in recent international history. While following international justice conceptions and liberal ideals of rule of law in its first stages, these notions were challenged in a second period with different international political circumstances. Contemporary conceptions, however, evidenced a normalization process of transitional justice and the expansion of humanitarian law to ordinary peacetime contexts. Additionally, new issues and actors appear to be incorporated into the transitional justice's contemporary and future agenda, as will be analysed below.<sup>91</sup>

### **I.3 Defining the Transitional Justice Paradigm**

Although the term 'transitional justice' was first officially coined in 1995 -with the publication of the book edited by Neil Kritz 'Transitional Justice: How Emerging Democracies Reckon with Former Regimes'-<sup>92</sup> this approach emerged before this time, as explained in the previous section. The term originally described different approaches and initiatives that were taking place in different countries with regard to human rights violations committed by repressive regimes, but they did not represent an exclusive list or a specific notion. They were essentially national initiatives, although in some cases the United Nations was involved.<sup>93</sup> Later on, the term started also to be used for processing war crimes and gross human rights violations committed during armed conflict.<sup>94</sup> The concept has increasingly gained importance and it has gradually extended its meaning.

In this sense, it is important to note that international context contributed to the development of transitional justices. Indeed, there has been increasing consensus and

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those created for the Balkans and Rwanda. See Teitel, R.G., *Globalising Transitional Justice. Contemporary Essays*, Oxford University Press, 2014 p.124.

<sup>91</sup> As the current debate of including ESCRs violations in transitional justice processes or the participation and role of non-State actors, such as corporations.

<sup>92</sup> Kritz, N., *Transitional Justice: How emerging Democracies Reckon with Former Regimes*, United States Institute for Peace Press, Washington DC, 1995. This was the first major study on the field and examined the relationship between justice and the prospects for a democratic transition.

<sup>93</sup> Shabas, W., 'Transitional Justice and the Norms of International Law', Presentation to the Annual meeting of the Japanese Society of International Law, Kwansei Gakuin University, 8 October 2011, p.1.

<sup>94</sup> See for instance, Minow, M., *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence*, Beacon Press, 1998. See also Teitel, R. G, *Transitional Justice, op.cit.*, p.234

observance of human rights standards since the end of the Cold War.<sup>95</sup> Similarly, the recognition that actions like torture, disappearances, and other violations of human rights constitute international crimes have helped to develop the scope of transitional justice as a field. According to Roht-Arriaza, international elements may have shaped human rights accountability on three levels: firstly, international human rights bodies consistently emphasized States' obligations in providing accountability for past violations; secondly, transnational networks of human rights activists and learning from each other's experiences in confronting violent pasts; thirdly, new international institutions have been created since the early 1990s, such as the ICTY, ICTR, and the ICC.<sup>96</sup>

Today, for the UN, transitional justice refers to 'the full set of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation'.<sup>97</sup> Likewise, this may include both judicial and non-judicial mechanisms with different levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>98</sup> In this same vein, the UN Secretary General noted that 'where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof.'<sup>99</sup> Similarly, 'the United Nations must consider through advance planning and consultation how different transitional justice mechanisms will interact to ensure that they do not conflict with one another.'<sup>100</sup> Therefore, the UN proposes to adopt a comprehensive approach

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<sup>95</sup> In Latin America, in particular, it has been suggested that during the years of authoritarianism in the 1970s, human rights gained unprecedented significance. See for instance, Panizza, F., 'Human Rights in the Processes of Transition and Consolidation of Democracy in Latin America', *Political Studies*, vol. 43, no.1, 1995, p. 169.

<sup>96</sup> Roht-Arriaza, N., 'The Role of International Actors in National Accountability Processes', in P. Aguilar-Fernandez, P., Brito, A. B. & Gonzalez-Enriquez, C. (Eds.), *The politics of memory: transitional justice in democratizing societies*, Oxford University Press, 2001. pp. 40-64.

<sup>97</sup> UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc S/2004/616, para.8, 23 August 2004, p. 4. Available at <http://www.ipu.org/splz-unga07/law.pdf> accessed 7 March 2018.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* para. 26.

<sup>100</sup> *Ibid.* The report notes that, for instance, truth commissions can positively complement criminal tribunals, as the examples of Argentina, Peru, Timor-Leste and Sierra Leone suggest. And in Timor-

towards transitional justice, integrating an appropriate combination of its own processes and mechanisms.

For its part, the International Center for Transitional Justice (ICTJ) defines transitional justice as ‘a response to systematic or widespread violations of human rights that seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy’.<sup>101</sup> It also points out that ‘transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.’<sup>102</sup>

Other definitions of transitional justice complement and add nuances to the above-mentioned ones. Naomi Roht-Arriaza, for instance, defines this field as the ‘set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with the past violations of human rights and humanitarian law’.<sup>103</sup> Although these general definitions include abuses of the whole spectrum of enshrined human rights, there were many transitional processes in which the stakeholders involved decided to limit the transitional justice process to serious and systematic violations of civil and political rights.<sup>104</sup>

In practice, transitional justice nowadays is the attempt to confront impunity, seek effective redress for human rights abuses and prevent recurrence, not in the routine application of normative standards, but in the careful and conscious appreciation of the contexts where it is to be done.<sup>105</sup> Societies have developed different approaches to past human rights abuses depending on the context and specific circumstances; this is one

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Leste, the Serious Crimes Unit worked in close conjunction with the Reception, Truth and Reconciliation Commission, as provided for in Regulation.

<sup>101</sup> ICTJ website, <https://www.ictj.org/about/transitional-justice> accessed 8 March 2018.

<sup>102</sup> *Ibid.*

<sup>103</sup> Roht-Arriaza, N. and Mariezcurrena, J., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge University Press, New York, 2006, p.2.

<sup>104</sup> Such as the case of Argentina, for instance, where the focus was on disappearances as was reflected in the Truth Commission (Comisión Nacional sobre la Desaparición de Personas, CONADEP, 1984). Other examples are Chile (focused on disappearances, killings and torture) and South Africa (focused on killings, abduction and torture or severe ill-treatment).

<sup>105</sup> Definition available at the ICTJ website. See supra note 101.

reason why the field has gained strength and diversity over the years. Throughout the years and the evolution of this field, there has been a proliferation of justice theories about how best to deal with past abuses as mentioned before. Retributive, restorative, and transformative justice are just a few examples of these theories, none of them escaping from their own criticisms.<sup>106</sup> However, while the specific aims of a transitional justice process will vary depending on the context, there are some constant features: recognition of the dignity of individuals, the redress and acknowledgement of violations and the aim to prevent them happening again.<sup>107</sup>

There is no single formula for dealing with a past of gross human rights abuses. While transitional justice approaches are naturally based on notions of democracy and human rights, each society must choose its own path to face a violent past. However, Public International Law and IHRL impose certain international legal obligations and principles that must be observed and implemented by States, and which constitute a basic legal support to the transitional justice process.<sup>108</sup> Those general obligations, which are also directly related to victims' rights,<sup>109</sup> are generally considered as stemming from the judgement of the IACtHR in the case *Velásquez Rodríguez v. Honduras*.<sup>110</sup> The Court enumerated the following State obligations: to prevent human rights violations;<sup>111</sup> the obligation to investigate and to punish human rights violations;<sup>112</sup> to remediate and repair victims' harm;<sup>113</sup> the obligation to guarantee human rights enjoyment from the public institutions.<sup>114</sup> In summary, States have the duty to prevent, to investigate, and to prosecute human rights violations. Likewise,

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<sup>106</sup> McGonigle Leyh, B., 'The Socialisation of Transitional Justice: expanding justice theories within the field', *op. cit.*, p. 84.

<sup>107</sup> *Ibid.*

<sup>108</sup> Alija Fernández, R.A., 'La multidimensionalidad de la justicia transicional: un balance entre los límites jurídicos internacionales y los límites de lo jurídico', in Bonet Pérez, J. and Alija Fernández, R.A., *Impunidad, derechos humanos y justicia transicional*, Cuadernos Deusto de Derechos Humanos, no. 53, Universidad de Deusto, 2009, p.103.

<sup>109</sup> As evidenced by the report of the former Special Rapporteur on the question of impunity of perpetrators of human rights violation, Louis Joinet. See Joinet, L., 'Question of the impunity of perpetrators of human rights violations (civil and political)', Final report, E/CN.4/Sub.2/1997/20, 1997. See also, Katamali, J.M., 'Accountability for genocide and other gross human rights violations: the need for an integrated and victim-based transitional justice', *Journal of Genocide Research*, vol. 9, no.2, 2007, p.276.

<sup>110</sup> IACtHR, *Velásquez Rodríguez v Honduras*, Merits, Series C. No.4 (1988).

<sup>111</sup> *Ibid.* para. 166 and 172-174.

<sup>112</sup> *Ibid.* para.166, 172, 173 and 174.

<sup>113</sup> *Ibid.* para. 166 and 174.

<sup>114</sup> *Ibid.* para. 166.

States must provide reparation to victims of such abuses. Together with these basic obligations, States must additionally certainly observe those human rights obligations to which compliance has been committed through conventional means.<sup>115</sup>

On the other hand, some argue that in such contexts of transition, the international community should facilitate the process. There are, however, some structural principles of Public International Law that should be respected in this sense and regarding the mutual relations of States. These general principles are the obligation not to intervene in the internal affairs of States, the principle of sovereign equality of States<sup>116</sup> and the obligation to respect and protect human dignity.<sup>117</sup> Accordingly, it does not seem feasible that the international community could impose a specific model on the State in transition, as it would be against the first two principles. Nevertheless, this does not preclude the promotion of certain human rights policies which has been indeed the basis of technical assistance frequently undertaken by international organisations in transitional justice processes.<sup>118</sup>

In any case and regardless of the specific circumstances of the transitional process itself, there appears to be some consensus about the role of transitional justice as aiming to deal with the issue of impunity for past atrocities and moving toward a democratic society in which human rights are respected. This general notion has given rise to different processes and mechanisms that will be described and analysed below.

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<sup>115</sup> Alija Fernández, R.A., ‘La multidimensionalidad de la justicia transicional: un balance entre los límites jurídicos internacionales y los límites de lo jurídico’, *op. cit.*, p.109.

<sup>116</sup> However, it should be noted that those principles have evolved due to human rights law, particularly regarding the responsibility to protect. See more about the evolution and limitations of these principles in Roncagliolo Benítez, I., ‘El principio de no intervención: consagración, evolución y problemas en el Derecho Internacional actual’, *Ius et Praxis*, vol.21, no.1, 2015, pp. 449-502.

<sup>117</sup> Resolution adopted by the General Assembly 2625(XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October, 1970. See also Carrillo Salcedo, J.A., *Soberanía de los Estados y derechos humanos en Derecho Internacional contemporáneo*, Tecnos, 2001, p.14-15.

<sup>118</sup> For instance, UN efforts led in 2005 to the creation of the Peace Consolidation Commission, an intergovernmental advisory body designed to ‘meet the special needs of countries emerging from conflict situations to advance towards recovery, reintegration and reconstruction and help them to sit down the foundations of sustainable development’, see UN, Document A / RES / 60/180-S / RES / 1645 (2005), regarding the establishment of the Peacebuilding Commission.

## I.4 Transitional Justice Processes and Mechanisms

It is commonly accepted that four processes constitute the core of transitional justice,<sup>119</sup> namely, a *truth process*, which allows the full investigation of mass atrocities so that the reality of what happened during the conflict or the repressive regime could be known by the whole society, including who the perpetrators were, how the violations were committed and where the remains of the victims lie; a *justice process*, in which perpetrators of human rights violations should be brought to justice; a *reparation process*, focusing on victims of atrocities; and an *institutional reform process*, to ensure and guarantee that such atrocities will not happen again.

Transitional justice mechanisms can be developed at domestic, international or even regional level. The UN has clearly Stated that regarding the international community, its main role is not to build international substitutes for national structures, but to help build domestic justice capacities.<sup>120</sup> This argument is reaffirmed when referring to specific mechanisms such as Truth Commissions and the institutional reform process as a whole.<sup>121</sup> The UN has also emphasized the importance of implementing a comprehensive approach to transitional justice, incorporating the full range of mechanisms at its disposal.<sup>122</sup> Additionally the OHCHR,<sup>123</sup> the UN

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<sup>119</sup> See for instance, Alija Fernández, R.A., ‘La multidimensionalidad de la justicia transicional: un balance entre los límites jurídicos internacionales y los límites de lo jurídico’, *op. cit.*, p. 143-162; See also on this topic Galain Palermo, P., *¿Justicia de Transición? Mecanismos políticos y jurídicos para la elaboración del pasado*, Tirant lo Blanch, 2016; Sandoval, C., Filipini, L., Vidal, R., ‘Linking Transitional Justice and Corporate Accountability’ in Michalowski, S., *Corporate Accountability in the Context of Transitional Justice*, Routledge, 2013, p.12; Domingo, P., ‘Dealing with legacies of violence: transitional justice and governance transitions’, Background note, Overseas Development Institute, May 2012, p.4. See also OHCHR, Analytical Study on Human Rights and Transitional Justice, UN Doc. A/HRC/12/18, 6 August 2009, p.9.

<sup>120</sup> UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *op. cit.*, p.1. Available at: <http://www.ipu.org/splz-e/unga07/law.pdf> accessed 6 March 2018.

<sup>121</sup> For instance, the OHCHR Report, ‘Rule of Law Tools for Post-Conflict States. Truth Commissions’, *op.cit.*, p.5 States that ‘International actors should provide comparative information and expertise, but should recognize from the start that a country may choose, for very legitimate reasons, not to have a truth commission or at least not to have one immediately upon transition. National views on this matter should be respected’.

<sup>122</sup> Resolution adopted by the Human Rights Council on Human Rights and Transitional Justice, A/HRC/RES/21/15, 2012 p. 3. Document available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/174/47/PDF/G1217447.pdf?OpenElement> accessed 8 March 2018.

<sup>123</sup> In decision No. 2006/47 on the rule of law, the Secretary-General designated OHCHR as the lead entity within the United Nations system for transitional justice.



Peacebuilding Commission, has added other processes to the above-mentioned ones which could help to build peace after conflict, such as *national consultations* and *disarmament*,<sup>124</sup> *demobilization and reintegration* (DDR).<sup>125</sup>

At the regional level, the IACtHR became the first human rights court to conduct a trial on self-amnesty law in The *Barrios Altos vs. Peru case*.<sup>126</sup> The Court held the Peruvian State internationally responsible for the violation of Articles 4 (right to life), 5 (human treatment), 8 (judicial guarantees), 25 (judicial protection), all in connection with article 1.1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic law) of the American Convention.<sup>127</sup> Therefore, the Court decided that the amnesty laws had no legal effect because of their incompatibility with the American Convention.<sup>128</sup> It should be noted here that while the Court recognised early on that non-State actors could commit human rights violations, the focus in transitional justice mechanisms was on the responsibility of the State to prevent and prosecute these abuses.<sup>129</sup> The EU adopted its Policy Framework on transitional justice in November 2015. Following the bottom up principle, -which recognises that external actors can only play a supporting role- it developed policies and strategies to help and support national transitional

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<sup>124</sup> *Ibid.* See also UN Secretary-General, Report of the Secretary General on Peacebuilding in the Immediate Aftermath of Conflict, UN Doc. A/63/881- S/2009/304, 11 June 2009, para.71. National Consultations are nowadays considered a *condition sine qua non* of transitional justice. Similarly, the UN has indicated in many reports and resolutions that transitional justice initiatives may encompass both judicial and non-judicial mechanisms, including individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals.

<sup>125</sup> DDR focuses on assisting ex-combatants to stop with the armed violence and reintegrate into society. It mainly takes place in case of conflict and, although in a parallel way to the main transitional justice process, it usually complements it. For further information see: Ball, N., and Van de Goor, L., 'Disarmament, Demobilization and Reintegration: Mapping issues, dilemmas and Guiding Principles', Clingendael Security and Conflict Programme, 2006.

<sup>126</sup> The *Barrios Altos vs. Peru* case considered the participation of the *Colina* group, a death squad linked to the Peruvian Army, in the invasion of a meeting which resulted in the execution of fifteen people and the serious injury of four others. IACtHR, Case *Barrios Altos v. Peru*, Merits, Judgement of March 14, 2001.

<sup>127</sup> The last four violations resulted from the promulgation and application of amnesty laws No. 26.479 and 26.492.11. See De Campos, C., 'Transitional Justice in South America: The Role of the Inter-American Court of Human Rights', *Jurídica*, Año IV, n°5, 83-92, 2009, p.85.

<sup>128</sup> IACtHR, Case *Barrios Altos v. Peru*, Merits, Judgement of March 14, 2001, para. 44.

<sup>129</sup> This aspect will be further analysed in Chapter III and IV. See Roth-Arriaza, N., 'Why was the Economic Dimension Missing for So Long in Transitional Justice? An Exploratory Essay', in Verbitsky, H. and Bohoslavsky, J.P., *The Economic Accomplices to the Argentine Dictatorship. Outstanding Debts*, *op.cit.*, p.22.

justices processes.<sup>130</sup> However, the EU Policy Framework does not mention or recognise the role of non-State actors in conflict, so it does not include particular references to business.

While all these initiatives may be relevant within the transitional justice framework, this thesis will focus on the core processes as they are widely implemented in most of the transitional justice contexts. Therefore, this section will analyse mechanisms and instruments according to their objectives and the processes in which they can be categorised. Transitional justice mechanisms and strategies may be grouped in four different categories according to the underlying logic, namely, on the need for justice, on the seeking for truth, on the search for restoration and rehabilitation, and focusing on reform.

#### **I.4. A Truth**

This process is based on the belief that victims and the society as a whole have the right to know what really happened, the right to know the truth. This right has been affirmed by treaty bodies,<sup>131</sup> regional courts<sup>132</sup> and domestic tribunals.<sup>133</sup> Accordingly,

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<sup>130</sup> EU Policy Framework on transitional justice, 2015. Document available at [http://eeas.europa.eu/archives/docs/top\\_stories/pdf/the\\_eus\\_policy\\_framework\\_on\\_support\\_to\\_transitional\\_justice.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf) accessed 10 March 2018.

<sup>131</sup> See for instance, International Convention for the Protection of All Persons from Enforced Disappearance, December 20, 2006, E/CN.4/2005/WG.22/WP.1/Rev.4.; American Convention on Human Rights, OAS Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, entered into force December 7, 1978. See also, Orentlicher, D., 'Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity,' 24 February 2004, (E/CN.4/2004/88).

<sup>132</sup> While there is no specific international convention on the right to the truth (and while UN declarations are not binding agreements), certain regional and national courts have confirmed the enforceability of this right within their jurisdictions. See for instance, IACtHR, *Velasquez Rodríguez v. Honduras*, Merits, Series C. No.4 (1988); IACtHR, *Myrna Mack Chang v. Guatemala*, Series C, No. 101, (2003); IACtHR, *Bamaca Velasquez v. Guatemala*, Series C, No. 91, (2002). See also ECtHR, *Cyprus v. Turkey*, 2001-I. 1(2001).

<sup>133</sup> See for instance, Corte Suprema de Justicia de la Nación Argentina [National Supreme Court of Justice], 14/6/2005, 'Simón, Julio Héctor y otros s/ privación ilegítima de la libertad', Case S. 17.768; Constitutional Tribunal of Peru, Genaro Villegas Namuche. Case No. 2488-2002-HC/TC, March 18, 2004; Constitutional Court of Colombia. *Gustavo Gallón Giraldo y Otros v. Colombia*. Sentencia No. C-

this right finds strong support in relation to certain crimes, such as disappearances.<sup>134</sup> In addition, the UN Working Group on Disappearances confirmed the existence of this right under international law, and not only in relation to disappearances.<sup>135</sup>

While criminal prosecutions are undeniably relevant, there are also other mechanisms to discover the facts of past events. Legal process could be more accurate when examining and evaluating the evidence, but many practitioners hold that the narrow focus of the legal process could produce a limited truth. For instance, political strategy behind crimes, social and cultural dynamics enabling them, and the effects on the victims are not usually captured.

The main and most common mechanism to deal with these issues is the Truth and Reconciliation Commission (TRC). A TRC is a commission of enquiry created by the State -usually by the executive or parliament- to investigate the most egregious crimes committed during conflict or repression with the aim to produce recommendations for dealing with the consequences.<sup>136</sup> While their mandates could be very diverse, TRCs constitute a very useful mechanism for considering the root causes of conflict or repression, the consequences and the nature of gross human rights violations. For instance, the South African TRC had the power to investigate crimes committed during the apartheid regime – including the use of subpoena and seizure powers-, as well as recommending the granting of an amnesty for perpetrators in exchange for full disclosure.<sup>137</sup> On the other hand, the Argentinian National Commission on the Disappeared (CONADEP) was mandated only to investigate the

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370/2006, May 18, 2006; Constitutional Court of South Africa. *The Citizen 1978 (Pty) Ltd and others v. McBride*. Case CCT 23/10, 2011, ZACC 11, April 8, 2011.

<sup>134</sup> See for instance, OHCHR, 'Rule of Law Tools for Post-Conflict States: Truth Commissions', HR/PUB/06/1, 2006, p.1. Available at: [www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf](http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf) accessed 10 March 2018.

<sup>135</sup> UN Working Group on Enforced or Involuntary Disappearances, General Comment in Relation to the Right to the Truth in Relation to Enforced Disappearances, 22 July 2010. Available at: [www.ohchr.org/Document/Issues/Disappearances/GC-right\\_to\\_the\\_truth.pdf](http://www.ohchr.org/Document/Issues/Disappearances/GC-right_to_the_truth.pdf) accessed 10 March 2018.

<sup>136</sup> See for instance, Freeman, M., *Truth Commissions and Procedural Fairness*, Cambridge University Press, New York, 2006.

<sup>137</sup> Promotion of National Unity and Reconciliation Act 34/1995, sections 5 and 6, [www.justice.gov.za/legislation/acts/1995-034.pdf](http://www.justice.gov.za/legislation/acts/1995-034.pdf) accessed 8 March 2018.

disappearances that took place during the *military junta*, without subpoena or seizure powers.<sup>138</sup>

TRCs usually have four main objectives. Primarily, they aim to establish what happened in the past and under what circumstances the crimes were committed. Secondly, they aim to establish an official record of causes of the conflict and provide recommendations. In addition, their findings can be used as a body of evidence for the purposes of reparations, for vetting public institutions of identified perpetrators or criminal justice investigations at a later, less politically risky, time. Finally, official recognition of the truth and acceptance of it can contribute to the process of healing and reconciliation.<sup>139</sup>

Although some TRCs are often primarily seen as models, their scope and modes of operation vary, as well as their context-specific mandates in practice.<sup>140</sup> Indeed, TRCs have been most popular in countries dealing with past authoritarian regimes where there were disappeared persons and hindered access to information about the persecution policy, as typically happened in Latin-American countries.<sup>141</sup> Conversely, TRCs have been of less interest in post-Communist Europe, where diverse governments used history itself as a destructive dimension of State repression.<sup>142</sup> Truth-telling exercises could also differ according to the political contexts, the extent of their credibility, the degree to which they are chaired by victims and other domestic constituencies and their ability to give voice to victims. In a very complex context, such

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<sup>138</sup> Alfonsín, R., (former Argentina's President), Decree 157/83, 15 December 1983, [www.derechos.org/ddhh/arg/ley/conadep.txt](http://www.derechos.org/ddhh/arg/ley/conadep.txt) accessed 2 March 2018.

<sup>139</sup> Domingo, P., 'Dealing with legacies of violence: transitional justice and governance transitions', *op. cit.* p.4

<sup>140</sup> See for instance, the 1984 Argentine Truth Commission Report, *Never Again*, which was the first of its kind; or the South African truth-telling exercise, that became a model for the region and a powerful marker of the end of Apartheid.

<sup>141</sup> Teitel, R.G., 'Transitional Justice Genealogy', *op. cit.*, p.79

<sup>142</sup> Accordingly, in Eastern Europe, main responses by the successor regime were guaranteed access to the historical record, rather than creating official histories. In fact, many countries in the region enacted laws allowing victims and others access to the files. See for instance, Teitel, R.G., 'Preface', in *Truth and Justice: The Delicate Balance: The Documentation of Prior Regimes and Individual Rights*, Budapest College, 1993.

as ongoing conflict or unresolved power struggles, truth-telling exercises can be undermined by those circumstances.<sup>143</sup>

According to the UN, Truth Commissions are not the best option for every country or every transition, and thus the decision to have a commission must always be taken by nationals after a broad consultative process in which the views of victims and survivors are taken into account, as well as the functions, and potentially strengths and limitations of the forthcoming TRC.<sup>144</sup> In any case, Truth Commissions' experiences so far have shown a potentially valuable tool in the quest for truth and to establish a historical record of the past events, particularly due to their victim-centred approach.

#### **I.4. B Justice**

The justice process builds on the assumption that sustainable peace and lasting reconciliation require that perpetrators of gross human rights violations are held accountable and punished for their acts. In this sense, common mechanisms include prosecution and sentencing at national, international and hybrid tribunals –joint international and domestic courts. Additionally, administrative measures to lock perpetrators out of public positions, as well as public exposure and social shaming constitute softer –and non-judicial- mechanisms.

States are obligated by Public International law to investigate some specific crimes, such as genocide, crimes against humanity, war crimes and torture.<sup>145</sup> Likewise, human rights treaties - such as the International Covenant on Civil and Political Rights - include the right to an effective remedy which has been generally understood to raise an

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<sup>143</sup> For instance, States such as Mozambique and Cambodia decided that revisiting the past would be too devastating for their traumatised populations. For more information about these issues see Mobekk, E., 'Transitional justice in post conflict societies: approaches to reconciliation', *Geneva: Geneva Centre for the Democratic Control of Armed Force*, 2005.

<sup>144</sup> OHCHR Report, 'Rule of Law Tools for Post-Conflict States. Truth Commissions', *op. cit.*, p. 5.

<sup>145</sup> See for instance, Mendez, J., 'Accountability for Past Abuses', *Human Rights Quarterly*, vol.19, no.2, 1997, pp. 255-288; see also Orentlicher, D, 'Setting Accounts Revisited: Reconciling Global Norms and Local Agency', *op. cit.*, pp. 10-22; see generally Márquez Carrasco, C., *Crímenes Contra la Humanidad: Noción y Elementos en Derecho Internacional Penal*, Servicio de Publicaciones de la Universidad de Sevilla, 2008.

obligation to provide reparations in relation to certain human rights violations, such as torture, disappearances and killings.<sup>146</sup>

As mentioned above, the judgement of the Inter-American Court on Human Rights in the case of *Velásquez Rodríguez v. Honduras* in 1988 set the legal basis for the above-mentioned Statement. In this judgement, the Court found that all States have four fundamental obligations in the area of human rights, namely: (1) to take reasonable steps to prevent human rights violations; (2) to conduct a serious investigation of violations when they occur; (3) to impose suitable sanctions on those responsible for the violations, and; (4) to ensure reparation for the victims of the violations.<sup>147</sup> Those principles have been explicitly confirmed in later decisions by the Court and endorsed in judgments by the European Court of Human Rights and UN treaty bodies such as the Human Rights Committee.<sup>148</sup>

At international level, *ad hoc* criminal tribunals have been established by the UN Security Council to deal with specific atrocities committed in Rwanda and the former Yugoslavia, and two hybrid international tribunals were set up for Sierra Leone and Lebanon. These developments have shown that if States fail to fulfill their obligations to pursue perpetrators of mass atrocities within their own jurisdiction, the international community can take action to do it instead.

Similarly, the International Criminal Court statute enshrines State-relevant obligations – such as *aut dedere aut judicare* obligations- to the fight against impunity and respect for victims' rights.<sup>149</sup> The jurisdiction of the Court, adopted by the Rome Statute in 1998 and entered into force in 2002, shall be limited to the most serious

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<sup>146</sup> Orentlicher, D, 'Setting Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *op. cit.*, p.14.

<sup>147</sup> IACtHR, *Velásquez Rodríguez v Honduras*, Merits, Series C. No.4 (1988), para.166.

<sup>148</sup> IACtHR, *Velásquez Rodríguez v Honduras*, Reparations and Costs (1989), para.28. See also ECHR Research Report, References to the Inter-American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights, 2016. Available at [http://www.echr.coe.int/Documents/Research\\_report\\_inter\\_american\\_court\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf) accessed 2 March 2018.

<sup>149</sup> See 'The obligation to extradite or prosecute (aut dedere aut judicare)' Final Report of the International Law Commission, 2014. Available at [http://legal.un.org/ilc/texts/instruments/english/reports/7\\_6\\_2014.pdf](http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf) accessed 2 March 2018. See also on this topic De Vos, C., Kendall, S., and Stahn, C., (eds.), *Contested Justice. The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, 2015.

crimes of concern to the international community as a whole.<sup>150</sup> Therefore, the Court has jurisdiction over individuals who commit any of the categorised international crimes as part of a widespread or systematic attack directed against any civilian population, namely: genocide,<sup>151</sup> crimes against humanity,<sup>152</sup> war crimes,<sup>153</sup> and aggression.<sup>154</sup>

As Schabas has pointed out, the Rome Statute of the International Criminal Court is today at the centre of the legal debate in the field, as it is impossible for States to assess the transitional justice options that are best suited to their own needs -and political and historical circumstances- without taking into account the possibility that the Court will decide to involve itself based on a different evaluation of priorities and regardless of their concerns.<sup>155</sup> But indeed, there is now a backlash with States pulling out of the Rome Statute.<sup>156</sup>

States have also made use of the universal jurisdiction for some human rights crimes, as happened with Chilean General Pinochet, who was arrested -and later released- in London in 1998, or prosecutions against Franco's dictatorship collaborators from Argentinian judges in 2010.<sup>157</sup> This principle, classically defined as 'a legal principle allowing or requiring a State to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim',<sup>158</sup> allows States to go beyond the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the

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<sup>150</sup> Rome Statute of the International Criminal Court, article 5. A/CONF.183/9.

<sup>151</sup> Rome Statute of the International Criminal Court, article 6.

<sup>152</sup> *Ibid.*, article 7.

<sup>153</sup> *Ibid.*, article 8.

<sup>154</sup> *Ibid.*, article 5.

<sup>155</sup> Shabas, R., 'Transitional Justice and the Norms of International Law', *op. cit.* p 11.

<sup>156</sup> States such as South Africa, Burundi and Gambia have been lately planning to leave the ICC during. See for instance 'African leaders plan mass withdrawal from international criminal court', The Guardian, 31 January 2017. Available at <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court> accessed 5 February 2018.

<sup>157</sup> However, political will in such cases is a decisive element as it has been evidenced. See for instance, Serrano Maíllo, M.I., *Prensa, Derecho y Poder Político: El Caso Pinochet en España*, Dykinson, 2002.

<sup>158</sup> Kenneth C. Randall, 'Universal jurisdiction under international law', Texas Law Review, no. 66, 1988, pp. 785–8; International Law Association Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences', 2000, p.2. The principle of universal jurisdiction could be extended to civil responsibility. This is e.g. the case in the United States with the Aliens Tort Act (28 U.S.C. para. 1350) and the well-known decision *Filaritiga v. Pena-Irala* 630F2d876 (2d Cir. 1980).

victim.<sup>159</sup> It thus departs from the premise that specific crimes are so harmful to the international community that States are entitled to bring proceedings against the perpetrator, regardless of the crime's location and the nationality of the perpetrator or/and the victim'.<sup>160</sup>

Joint tribunals have been used as another strategy, where domestic and international judges work together, as has happened in Indonesia and Sierra Leone. They represent the national legitimacy while at the same time compensating for problems in the domestic justice system. These above-mentioned justice mechanisms can be categorised into two further sub-types: mechanisms to obtain retributive justice and mechanisms that seek other forms of justice –not only punitive-, such as restorative justice.<sup>161</sup> States may usually choose the retributive route mainly because, together with the justice sector reform, domestic criminal prosecution can help to build the rule of law.<sup>162</sup> However, transitional contexts are characterized by weak institutional and political conditions which may make domestic trials not feasible.<sup>163</sup> As other applicable options, local community justice mechanisms have been established as means of restorative justice, such as the *mato oput* -a community rite of reparation and reconciliation- in Northern Uganda<sup>164</sup> and more reinvented institutions, such as *gacaca* in Rwanda.<sup>165</sup>

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<sup>159</sup> The territorial link has been gradually overcome by two criteria allowing for extraterritorial jurisdiction, such as jurisdiction over crimes committed outside the territory by the State's own nationals (active personality jurisdiction) or crimes committed against a State's own nationals (passive personality jurisdiction). This latter possibility has been challenged by some States.

<sup>160</sup> Robinson, M., 'Foreword', *The Princeton Principles on Universal Jurisdiction*, Princeton University Press, 2001, p. 16.

<sup>161</sup> Domingo, P., 'Dealing with legacies of violence: transitional justice and governance transitions', *op. cit.*, p.4.

<sup>162</sup> See for instance, Kritz, N. J. (ed.) *Transitional justice: how emerging democracies reckon with former regimes*, US Institute of Peace, vol.1, 1995. The UN 2004 strategy recognises this linkage and it has also featured in some UN practice (e.g. its rule of law work in north Sudan). In addition, there are potential synergies between transitional justice and the rule of law, such as when the first one helps to build a culture of accountability, see for instance Skaar, E., Gianella Malca, C. Eide, T., *A way out of violent conflict: the impact of transitional justice on peace and democracy*. CMI (CHR Michelsen Institute), 2012.

<sup>163</sup> The most unfavourable context would be the one where it continued the support for the past regime and/or groups responsible for past human rights violations, giving them a significant disruptive potential.

<sup>164</sup> For more info about this initiative see <https://www.facinghistory.org/reckoning/paradox-peace-and-justice-mato-oput-versus-icc-uganda> accessed 22 March 2018.

<sup>165</sup> For further information see: <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml> accessed 22 March 2018.



At the social level, bringing perpetrators to justice shows a clear break with the past atrocities and responds to the popular claim for justice, which is needed to build trust in the new political, social and institutional system. The culture of impunity and amnesties, in contrast, could be detrimental to the reconciliation process and, therefore, to the achievement of sustainable peace.<sup>166</sup>

#### I.4. C Reparations

Transitional justice is based on the assumption that serious harm caused to victims should be redressed.<sup>167</sup> This conception is closely linked to States' obligation to provide reparation under international law,<sup>168</sup> which will be considered unfulfilled when the behavior of the State allows the violation to go unpunished.<sup>169</sup> Such State breach of international law, whether by action or by omission, constitutes an internationally wrongful act, so it will lead to international responsibility and will involve the obligation to repair victims.<sup>170</sup>

Nevertheless, States often embark on a reparations process without acknowledging any legal responsibility for the human rights violations that were committed. They rather appear to contribute to the reparation process to help their own population to move forward.<sup>171</sup> By contrast, it is also common that third countries contribute to the reparations process, not because they are obligated by international law to do so, but because they decide to cooperate with such process.<sup>172</sup> Concerning the

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<sup>166</sup> See for instance, Thoms, O.N.T., Ron, J., and Paris, R., 'The effects of transitional justice mechanisms: A summary of empirical research findings and implications for analysts and practitioners', In CIPS Working Paper, *Center for International Policy Studies*, 2008, p.39.

<sup>167</sup> Sandoval Villalba, C., 'Transitional Justice: Key Concepts, Processes and Challenge', *Institute for Democracy & Conflict Resolution*, Briefing Paper, 2011, p.5.

<sup>168</sup> PCIJ, *Affaire relative à l'usine de Chorzów (Demande en indemnité)*, Compétence, 26 July 1927, Series A, no.9, p. 21. Literally, the Court stated that 'C'est un principe de droit international que la violation d'un engagement entraîne l'obligation de réparer dans une forme adéquate'.

<sup>169</sup> IACtHR, *Velasquez Rodriguez vs. Honduras*, Judgement 29 July 1998, Serie C, n° 4, para. 176.

<sup>170</sup> See ECHR, *Bazorkina v. Russia*, judgement of 27 July 2006, no 69481/01, para. 161.

<sup>171</sup> In Colombia, for instance, the government established the '*Programa de Reparación Individual por Via Administrativa*' (Administrative Reparations Programme) in order to provide reparations to victims of crimes (such as disappearances and arbitrary killings) committed by the guerrillas or paramilitary groups before 22 April 2008.

<sup>172</sup> For example, the United States, through USAID, assisted in 1992 to finance the comprehensive health programme created for victims known as PRAIS (*Programa de Reparación y Ayuda Integral en Salud y Derechos*) in Chile.

second notion, international criminal law recognises individual criminal responsibility for crimes against humanity, war crimes, genocide and aggression. Perpetrators of such crimes should also repair the harm they caused to their victims.<sup>173</sup> The Rome Statute indicates that the Court should establish the principles of reparations to be applied to the perpetrators of crimes under its jurisdiction. While some progress has been made in this respect, as evidenced in the Lubanga case,<sup>174</sup> how to effectively provide adequate reparation remains a complex issue, and one to which there is not yet an appropriate answer, as Sandoval notes.<sup>175</sup>

According to UN General Assembly Resolution 60/147, and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, reparations should be adequate, effective and prompt.<sup>176</sup> They could also include, as appropriate, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>177</sup> With restitution, victims would be restored to the position they held before the abuse they suffered, or as best as possible.<sup>178</sup> Compensation, instead, includes economic payment for damages, which can be physical, mental or property damages.<sup>179</sup> Rehabilitation implies medical and psychological care, as well as legal and social services.<sup>180</sup> Satisfaction would involve

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<sup>173</sup> Rome Statute of the International Criminal Court, article 75. See generally, Lirola Delgado, I. and Martín Martínez, M., *La Corte Penal Internacional: justicia versus impunidad*, Editorial Ariel, 2001.

<sup>174</sup> On 21 October 2016, Trial Chamber II approved and ordered to start the implementation of a plan submitted for symbolic collective reparations for the victims in relation to this case. The implementation of symbolic reparations ‘paves the way for the social acceptance of reparations awards in the affected communities’. According to the Chamber, its decision on collective reparations programmes, which are not of symbolic nature, will be issued in due course. ICC, *The Prosecutor v. Thomas Lubanga Dyilo*. ICC-01/04-01/06-2842.

<sup>175</sup> Sandoval points out that while some consensus exists to support the idea that adequate reparation in such situations includes the investigation and prosecution of those who committed the crime, it should also include a combination of other forms of reparation given the seriousness of the violation, and always bearing in mind the particular situation of each victim. Sandoval Villalba, C., ‘Transitional Justice: Key Concepts, Processes and Challenge’, *op. cit.*, p.6.

<sup>176</sup> UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, 16 December 2005.

<sup>177</sup> *Ibid.*, Principle IX.18

<sup>178</sup> Bassiouni, M.C., ‘International Recognition of Victims’ Rights’, *Human Rights Law Review*, vol.6, no.2, 2006, p. 268.

<sup>179</sup> UNCHR, The right to a remedy and reparation for victims of violations of international human rights and humanitarian law; Note by the High Commissioner for Human Rights (E/CN.4/2004/57)

<sup>180</sup> Bassiouni, M.C., ‘International Recognition of Victims’ Rights’, *op. cit.*, p. 270.

policy measures aimed at acknowledging the harm, public disclosure of the truth, a public apology, and memorials and commemorations for victims. Ultimately, guarantees of non-repetition may entail legislative reforms and education initiatives to avoid recurrence of past abuses.<sup>181</sup>

In the reparation process, the State undertakes to compensate victims and their families for their losses. Thus, the objective is to provide concrete remedies, to acknowledge injustice and, possibly, to restore confidence and trust in the State institutions. Reparation mechanisms may take different forms, ranging from compensation payments to victims, rehabilitation programmes, peace-building projects in conflict-torn communities, memory projects, and symbolic measures, such as official apologies, commemorative ceremonies or the establishment of memorials.

The most direct form of reparation is when perpetrators directly compensate their victims, voluntarily or as the result of a trial.<sup>182</sup> This may take the form of monetary compensation for loss and damages, other forms of reparation and/or an apology. However, this situation has some specific requirements, such as an individualised relationship between perpetrators and victims and that the perpetrators have the means to compensate and can be compelled to do so.<sup>183</sup> When these sorts of measures are not an option, for practical or political reasons, reparations usually take place through public efforts.<sup>184</sup> While economic compensation is usually difficult due to

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<sup>181</sup> See for instance, Galván Puente, H.S, 'Legislative Measures as Guarantees of Non-repetition: A Reality in the Inter-American Court, and a Possible Solution for the European Court,' *Revista Instituto Interamericano de Derechos Humanos*, no. 49, 2009, p. 69.

<sup>182</sup> This kind of reparations can be also provided by civil trials such as the landmark case under the ATS, *Filartiga v. Peña-Ilara*, 630 F.2d, 876, (2d Cir. 1980), 30 June 1980.

<sup>183</sup> Gloppen, S., 'Reconciliation and Democratization: Outlining the Research Field', *op. cit.*, p.32.

<sup>184</sup> An example of that can be found in the Lubanga case, in which the Court, in view of Mr Lubanga's indigence, invited the Board of Directors of the Trust Fund for Victims to examine the possibility of earmarking an additional amount for the implementation of collective reparations in this case and/or continuing its efforts to raise additional funds. The Chamber also instructed the Trust Fund to make contact with the Government of the Democratic Republic of the Congo (DRC) to explore how the Government might contribute to the reparations process. *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 15 December 2017. Order for Reparations amended, ICC-01/04-01/06-3129-AnxA. Document available at [https://www.icc-cpi.int/RelatedRecords/CR2015\\_02633.PDF](https://www.icc-cpi.int/RelatedRecords/CR2015_02633.PDF) accessed 21 March 2018.

the weakness of the transitional State, there are cases where the State has disbursed compensatory funds to victims and their families.<sup>185</sup>

Reparations' primary and key aim is to return victims to the *status quo ante*. However, this is extremely difficult – if not often impossible- in transitional contexts especially due to the nature of the violations that might have been committed. Other hardships, such as the scarcity of economic resources of the State, the alleged insolvency of perpetrators and the lack of a clear institutional system, make proper reparations even more difficult to be achieved. The reparation process has also generated important discussion regarding its transformative potential.<sup>186</sup> Reparations can be seen as a means to move towards development and to give new opportunities to poor and discriminated populations, which is usually the situation of the victims.<sup>187</sup> This new trend, so-called *transformative justice*, has challenged the traditional understanding of transitional justice, which has been historically limited to the achievement of justice –retributive justice- for past human rights violations.<sup>188</sup> However, there is still controversy around how to link the transitional justice process to development and to the fulfillment of economic, social and cultural rights, as we will further analyse in Chapter two. Indeed, particularly difficult has been the restoration of property rights because it implies the redistribution of private resources – which often involves resistance by those who benefit from impunity. For instance, the Colombian Government is currently testing whether it will be able to restore land to internally displaced people following recent legislation to overturn illegal land takeovers during the years of conflict.<sup>189</sup>

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<sup>185</sup> See for instance the cases of Chile and Honduras, the latter as a result of a ruling by the Inter-American Court.

<sup>186</sup> Roht-Arriaza, N. and Orlovsky, K., 'A Complementary Relationship: Reparations and Development', in De Greiff, P. and Duthie, R. (eds.), 2009, *Transitional Justice and Development: Making Connections*, Social Sciences Research Council, p.170.

<sup>187</sup> This could not happen if the aim of reparation is simply to return the victim to the *status quo ante*. See for instance, IACtHR, *Cotton Field vs. Mexico*, preliminary exceptions, merits, reparations and legal cost, 16 November 2009, para.450.

<sup>188</sup> Lambourne, W., 'Transformative justice, reconciliation and peacebuilding', in Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Mieth F., *Transitional Justice Theories*, *op. cit.*, p.20.

<sup>189</sup> Domingo, P., 'Dealing with legacies of violence: transitional justice and governance transitions', *op. cit.*, p.5.

#### **I.4. D Institutional Reform**

State institutions have been often directly involved in the commission of human rights violations during the armed conflict or repression. In other cases, they simply failed to prevent it and protect victims from the abuses. In transitional contexts, States should deal not only with the abuses committed, but also with the structures that made them possible. Consequently, reforming these institutions is an essential stage to prevent such human rights violations from occurring again.<sup>190</sup> Thus, the process of institutional reform is closely linked to guarantees of non-repetition and the key concern of such measures is prevention.

According to principle 36 of the principles to combat impunity, ‘States must take all necessary measures, including legislative and administrative reforms, to ensure that public institutions are organized in a manner that ensures respect for the rule of law and protection of human rights.’<sup>191</sup> To this aim, the security sector and justice sector are the main focus of this process. The security sector refers to ‘the structures, institutions and personnel responsible for the management, provision and oversight of security in a country’,<sup>192</sup> including the police, military personnel, intelligence services, and private security companies. Regarding the justice sector, it should be noted that it is a core element of the transitional justice process. This domain includes prison reform, democratic oversight and accountability, civil society, and others.<sup>193</sup>

Within the framework of transitional justice processes, institutional reform contributes to building fair and efficient institutions. Indeed, efficient public institutions would play a crucial role in preventing future abuses. Avoiding repetition and preventing human rights abuses certainly constitutes a key goal of transitional justice.

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<sup>190</sup> Orentlicher, D., *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principles 35 to 38. Document available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement> accessed 22 March 2018.

<sup>191</sup> *Ibid.*

<sup>192</sup> UN General Assembly Security Council, UN Secretary General, *Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform*, UN Doc A/62/659-S/2008/39, 23 January 2008.

<sup>193</sup> The OECD refers to ‘security system’ to have a more encompassing concept that integrates the security and justice sectors. OECD DAC, *Handbook on Security System Reforms: Supporting Security and Justice*, OECD, Paris, 2007.

On the other hand, institutional reform enables public institutions, particularly the security and justice sectors, to address accountability for past human rights violations. Indeed, a fair and reformed security sector could be tasked to investigate past abuses committed under conflict or authoritarianism. Similarly, a reformed justice sector can prosecute and sentence those involved in past abuses. In summary, institutional reform can be seen as an important precondition for providing domestic accountability for past human rights abuses.<sup>194</sup>

Certainly, one of the biggest challenges at this point is to rebuild societies' trust in the State institutions and security system. The OECD and the UN consider it essential to carry out a proper assessment of the former structures that failed to prevent and protect victims from abuses.<sup>195</sup> Specific mechanisms herein aim, particularly but not only, to vet and purge security forces and State officials who were directly involved or were complicit in the commission of such crimes.<sup>196</sup> Thus, vetting and removing perpetrators of human rights abuses from political and institutional positions can be crucial in the re-construction of the State.<sup>197</sup> According to the OHCHR, vetting of public offices -as part of a wider institutional reform approach- which aims to turn abusive institutions into law-respecting bodies, can help to build the rule of law.<sup>198</sup>

Similarly, both disciplinary and criminal procedures should be established to deal with irregularities and impunity<sup>199</sup> and educational training of security sector and justice sector personnel is essential, to ensure they understand the rights of all individuals, that certain conducts are forbidden, and that a culture of impunity will not

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<sup>194</sup> OHCHR Report, 'Rule of Law Tools for Post-Conflict States. Vetting: an operational framework', 2006, p.4. Available at <http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf> accessed 22 March 2018.

<sup>195</sup> Sandoval Villalba, C., 'Transitional Justice: Key Concepts, Processes and Challenges', *op. cit.*, p. 10.

<sup>196</sup> If an individual lacks integrity regarding the lack of respect for human rights- they should be removed from its post or not be appointed to any public position Duthie, R., 'Introduction', in Mayer-Rieckh and De Greiff, P.(eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, Social Science Research Council, 2007, p.17.

<sup>197</sup> Alija Fernández, R.A., 'La multidimensionalidad de la justicia transicional: un balance entre los límites jurídicos internacionales y los límites de lo jurídico', *op. cit.*, p.163

<sup>198</sup> OHCHR Report, 'Rule of Law Tools for Post-Conflict States. Vetting: an operational framework', *op. cit.*, p.4.

<sup>199</sup> Davis, L., 'Transitional Justice and Security System Reform', *Initiative for Peacebuilding*, ICTJ, 2009.

be tolerated.<sup>200</sup> Furthermore, recommendations of a Truth Commission are ultimately intended to advance the type of reforms that may be helpful to rebuild society's trust. These recommendations may include judicial, legislative, legal or political reforms. Indeed, Truth Commissions could work for instance, in the identification of the institutions that must be reformed or eliminated and identifying those responsible for corruption. Similarly, through their public hearings, truth commissions can also focus governmental and public attention on specific institutions, such as the media, and judicial branch institutions, serving as a catalyst for a public debate on the role of these institutions.<sup>201</sup> Although the more accurate the recommendations could be, the more likely they will be implemented, they will ultimately depend on civil society groups and the new political order.<sup>202</sup>

Among the numerous and relevant challenges that institutional reform faces, it is worth mentioning the lack of political will to carry out the political and structural reforms needed –especially when reforms might also entail accountability measures– and the influence of the international community, which it is not always as positive and consistent as it should be, so that it may reduce the effectiveness of reforms.<sup>203</sup>

#### **I.4.E Assessing the impact of transitional justice.**

Many of the above-mentioned mechanisms are usually established with a specific mandate and timeframe. Nevertheless, experience shows that temporary and permanent mechanisms can coexist in an effort to deal with the legacy of abuse and

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<sup>200</sup> Sandoval, C., Filipini, L., Vidal, R., 'Linking Transitional Justice and Corporate Accountability', *op. cit.*, p.23.

<sup>201</sup> Van Zyl, P., 'Promoviendo la justicia transicional en sociedades post conflicto', in Reátegui, F. (ed.) *Justicia Transicional. Manual para América Latina*, Ministerio de Justicia. Comisión de Amnistía. Centro Internacional para la Justicia Transición, 2011, p. 57-58.

<sup>202</sup> In South Africa, for instance, the Truth and Reconciliation Commission recommended taking specific measures with regard to corporations that benefited and actively participated in the Apartheid regime. However, the new democratic government decided to ignore these recommendations in support of the reconciliation spirit.

<sup>203</sup> Sandoval Villalba, C., 'Transitional Justice: Key Concepts, Processes and Challenges'. *op. cit.*, p.9

with prevention. While methodologies for assessing impact are advancing,<sup>204</sup> there is as of yet, no comprehensive analytical framework for assessing the impact of transitional justice mechanisms. However, some interesting aspects related to this issue are worth mentioning here.<sup>205</sup>

Firstly, we should bear in mind that transitional justice is a field based on principles rather than on data, which makes it difficult to assess detailed impact evidence.<sup>206</sup> Scholarship usually focuses on analyzing the strengths and weaknesses of some specific mechanisms – in particular Truth Commissions- but much of the existing literature in the field simply assumes that those mechanisms offer tangible benefits, rather than treating them as testable propositions.<sup>207</sup> Secondly, it is extremely difficult to properly compare transitional justice mechanisms across countries, since they often have different structures, mandates and implementation.<sup>208</sup> Transitional justice processes are developed according to the specific contexts and circumstances of the country in transition, so there are not two identical transitional processes. Finally, some outcomes are inherently difficult to measure, such as reconciliation and healing. Similarly, it is also common for Transitional Justice studies to conflate analytically distinct outcomes, such as peace and democracy, and peace and reconciliation.<sup>209</sup>

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<sup>204</sup> There are several large-scale transitional justice data collection projects and studies . See, for instance, the Transitional Justice Data Base Project, available at <https://sites.google.com/site/transitionaljusticedatabase/> accessed 22 March 2018; also, Van der Merwe, H., Baxter, V., et al., (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, United States Institute of Peace Press, 2009.

<sup>205</sup> For a complete study on the impact and the challenges of transitional justice mechanisms see Skaar, E., ‘Understanding the Impact of Transitional Justice on Peace and Democracy’, *ECPR paper*, 2011.

<sup>206</sup> Mendeloff, D, ‘Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?’, *op.cit.*, p.11.

<sup>207</sup> See for instance, Vinjamuri, L, and Snyder, J., ‘Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice’, *Annual Review of Political Science*, no.7, 2004, p.359; Gloppen, S., ‘Roads to Reconciliation: A Conceptual Framework,’ in (eds.) Skaar, E., Gloppen, S., and Suhrke, A., *Roads to Reconciliation*, Lexington Books, 2005, p.21-22.

<sup>208</sup> On variation in truth commissions, see for instance Hayner, P., *Unspeakable Truths. Confronting State Terror and Atrocity*, *op. cit.* On variation in vetting processes, see De Greiff, P. (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, Social Science Research Council, New York, 2007.

<sup>209</sup> Mendeloff, D, ‘Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?’, *op.cit.*, p. 362.



## I.5 Transitional Justice Theories

The field of transitional justice has been characterised by a relative lack of theoretical frameworks.<sup>210</sup> Indeed, transitional justice practice and discourse have been mainly based on notions of political transitions and justice adopted from the Western thinking, and thus, shaped by specific historical experiences.<sup>211</sup> However, theories about how best to deal with past abuses in transitional contexts have recently proliferated. But before analysing those theories and their goals, some preliminary remarks should be made to better understand how transitional justice is -and has been- conceived.

Given the heterogeneity of the field of transitional justice, articulating a common theoretical language has not been a simple task. While it is widely agreed that transitional justice has become a discipline of its own,<sup>212</sup> the boundaries of the field remain diffuse. As a multidisciplinary area, transitional justice encompasses not only different disciplines but also different perspectives and methodologies. Similarly, the wide range of mechanisms and practices involved in transitional justice processes broaden the field, hampering the task to adopt a unique theory of transitional justice. While formal rules and State institutions used to be the focus of legal and political science approaches, anthropological and sociological approaches to transitional justice is often oriented to the value and challenges of transitional politics on the group and individual level.<sup>213</sup>

On the other hand, transitional justice seems to be continually in motion. The field has experienced a significant expansion, particularly regarding the contexts in which it should be applied. For instance, transitional justice mechanisms have been implemented in situations devoid of any form of political transition, such as in the

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<sup>210</sup> See Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Mieth, F. 'Transitional justice theories: An introduction', in Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Mieth, F.(Eds), *Transitional Justice Theories, op.cit.*, p.1.

<sup>211</sup> Such as the Second World War Trials in Nuremberg and Tokyo, as well as the establishment of international criminal tribunals, such as the tribunals for the former Yugoslavia and Rwanda.

<sup>212</sup> See for instance Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Mieth, F. 'Transitional justice theories: An introduction', *op. cit.*, p. 2

<sup>213</sup> *Ibid.*

internal conflict of Colombia or under consolidated democracy in Argentina,<sup>214</sup> where there are not political transitions.<sup>215</sup> Similarly, the notion of transitional justice has expanded its goals. As noted by McGonigle, earliest conceptions of transitional justice were predominantly top-down processes, focusing on civil and political rights violations and consequently later criticised by this narrow emphasis. However, the latest debates are focused on the socioeconomic dimension of justice and how transitional justice can be best connected to development.<sup>216</sup> Certainly, this expansion has enriched the field but also blurred the boundaries of the notion of transitional justice, which raises new theoretical challenges. While there are several theories of how transitional justice strategies should be developed and implemented, we will focus in this section on the most representative ones, namely retributive, restorative, reparative and transformative justice.<sup>217</sup>

Retributive justice theories have inspired the earliest conceptions of transitional justice. Focused on retribution through criminal trials and punishment, the judicial accountability process has been considered an end in itself.<sup>218</sup> The notion, thus, essentially refers to the repair of justice through unilateral imposition of punishment. Therefore, retributive justice individualises the punishment and limits the scope of possible collective guilt,<sup>219</sup> highlighting that no individual is above the law.<sup>220</sup> Accordingly, perpetrators deserve to be punished in proportion to the severity of the wrongdoing to re-establish justice. However, retributive theories are not victim-

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<sup>214</sup> We refer here to the initiatives implemented for instance during Kichners' administration from 2003 to 2015, as democracy was installed in Argentina in 1983.

<sup>215</sup> Hansen, T.O., 'The vertical and horizontal expansion of transitional justice: explanations and implications for a contested field', in in Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Mieth, F. (Eds), *Transitional Justice Theories, op. cit.*, pp. 105-124.

<sup>216</sup> See for instance, Mani, R., 'Editorial: Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development', *International Journal of Transitional Justice*, vol. 2, 2008, pp. 253–265; or Greiff, P. and Duthie, R., 'Transitional Justice and Development: Making Connections', *Social Science Research Council*, 2009.

<sup>217</sup> In the development of these theories, we will follow the categorization done by Brianne McGonigle Leyh in her article 'The Socialisation of Transitional Justice: expanding justice theories within the field', *Human Rights and International Legal Discourse, Intersentia*, no.1, 2017.

<sup>218</sup> Heikkilä, M., *International Criminal Tribunals and Victims of Crime*, Abo Akademi University Press, 2004, p.23.

<sup>219</sup> Leebaw, B., 'The Irreconcilable Goals of Transitional Justice', *op. cit.*, p. 110.

<sup>220</sup> Orentlicher, D.F., 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Review*, vol. 100, no.8, 1991, p.100.

centred.<sup>221</sup> Rather, it considers punishment as a response to a violation of State rules but not as a response to the harm suffered by the victim.<sup>222</sup> Theories of retributive justice have been strongly criticised, especially in situations of collective violence and mass victimisation.<sup>223</sup> Indeed, simply judging and punishing perpetrators do not contribute to alleviating victims' harm or the situation in which the abuse has left them. Furthermore, most trials within the framework of transitional justice processes have been focused on civil and political rights violations.<sup>224</sup> Due to the failure of retributive justice to address the needs of victims and to effectively respond to mass atrocity, new justice theories have raised, attempting to bridge those gaps.

Restorative justice, conversely, considers that abuses are not committed against the State, but against another individual. Consequently, restitution for the damage suffered by victims should be the main goal of justice, rather than punishment.<sup>225</sup> The crime is, therefore, a breach of the social relationship in the first instance, and secondly, a violation of the law.<sup>226</sup> Restorative justice theories then place the focus on the attempt to repair the victim.<sup>227</sup> As McGonigle notes, restorative justice processes are most effectively employed only after the finding or acceptance of guilt, or acceptance by the alleged perpetrator of basic facts of the wrong committed.<sup>228</sup> Arguably, this theory has been implemented with relative success in cases such as Rwanda,<sup>229</sup> South Africa<sup>230</sup> and

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<sup>221</sup> McGonigle Leyh, B., 'The Socialisation of Transitional Justice: expanding justice theories within the field', *Human Rights and International Legal Discourse*, Intersentia, no.1, 2017, p.86.

<sup>222</sup> Heikkilä, M., *International Criminal Tribunals and Victims of Crime*, *op.cit.*, pp. 26–27.

<sup>223</sup> See for instance, Clark, J.N., 'The Limits of Retributive Justice Findings of an Empirical Study in Bosnia and Herzegovina', *Journal of International Criminal Justice*, vol. 7, 2009, pp. 463–487.

<sup>224</sup> See for instance Sharp, D.N., 'Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice', *Fordham International Law Journal*, no.35, 2012, p. 780; or Cahill-Ripley, A., 'Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights', *Netherlands Quarterly Human Rights*, no.32, 2014, p. 183. We further discuss about the traditional invisibility of ESCRs in transitional justice processes in chapter two (section three).

<sup>225</sup> Barnett, R.E., 'Restitution: A New Paradigm of Criminal Justice', *Ethics*, no. 87, vol. 4, 1977, pp. 287–291.

<sup>226</sup> Luna, E., 'Punishment Theory, Holism, and the Procedural Conception of Restorative Justice', *Utah Law Review*, vol.1, 2003, p. 228.

<sup>227</sup> See Rauschenbach, M and Scalia, D. 'Victims and International Criminal Justice: A Vexed Question', *International Review of the Red Cross*, vol.90, no. 870, 2008, pp.441–459.

<sup>228</sup> McGonigle Leyh, B., 'The Socialisation of Transitional Justice: expanding justice theories within the field', *op.cit.*, p.88.

<sup>229</sup> See for instance, Retting, M., 'Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?', *African Studies Review*, vol. 51, no. 3, 2008, pp. 25-50; or de Brouwer, A.M. and E. Ruvebana, E., 'The

Uganda.<sup>231</sup> At the individual level, the notion of restorative justice implies focusing on the victim through healing, reparation (including economic or symbolic nature) and reconciliation. At the social level, these processes aim to advance national reconciliation.<sup>232</sup> Main criticisms of retributive justice theories argue that simply shaming and reintegration fail to acknowledge the cultural contexts in which it may or may not be effective.<sup>233</sup> Indeed, purely restorative justice theories have a number of limitations in the field, such as the focus on national reconciliation, which may come at the expense of actual reparation to victims.<sup>234</sup>

As well as restorative theories, reparative justice is focused on victims and on the reparation of harm they have suffered. Specifically, this notion supports the idea that reparations are essential in the pathway to peaceful resolution of conflicts.<sup>235</sup> Importantly, reparations have become a major element in transitional justice strategies. Reparations should be proportional to the harm suffered and governments should strive to develop assistance programmes for victims. In contrast to restorative justice, reparative theories do not include the condition of forgiveness, but perceive that the victim will be empowered by publicly acknowledging the wrong and tangibly making amends.<sup>236</sup> Admittedly, the cost of providing reparations for mass violations is high and quite difficult to calculate. In fact, State reparation policies have traditionally tended to focus on a narrow set of victims and crimes precisely due to budgetary limitations and lack of political will. Critics of this theory argue that reparative justice should aim to improve or positively transform the position of the victim within society, not simply place them back in the position they had prior to the violation.<sup>237</sup>

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Legacy of Gacaca Courts in Rwanda: Survivors' Views', *International Criminal Law Review*, vol.13, 2013, pp. 937–976.

<sup>230</sup> Koska, G., 'Corporate accountability in times of transition: the role of restorative justice in the South African Truth and Reconciliation Commission', *Restorative Justice International Journal*, vol. 4, no.1, 2016, pp. 41-67.

<sup>231</sup> Baines, E.K., 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda', *International Journal of Transitional Justice*, no.1, 2007, pp. 91–114.

<sup>232</sup> Hayner, P.B., *Unspeakable Truths: Confronting State Terror and Atrocity*, *op. cit.*, p.155.

<sup>233</sup> Braithwaite, J., *Crime, Shame and Reintegration*, Cambridge University Press, 1989, p.8.

<sup>234</sup> Leebaw, B., 'The Irreconcilable Goals of Transitional Justice', *op. cit.*, p. 116

<sup>235</sup> McGonigle Leyh, B., 'The Socialisation of Transitional Justice: expanding justice theories within the field', *op. cit.*, p. 89.

<sup>236</sup> *Ibid.*

<sup>237</sup> See for instance, Lambourne, W., 'Transformative justice, reconciliation and peacebuilding', in Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Mieth F., *Transitional Justice Theories*, Routledge, 2014, p.20; See also Uprimmy Yepes, R., 'Transformative Reparations of Massive Gross Human Rights

Following this idea, several scholars have called on including social justice in transitional justice processes. This new approach has been defined as transformative justice. While transitional justice processes have been traditionally focused on a narrow set of human rights violations,<sup>238</sup> transformative justice implies a more holistic approach. Supporters of these theories argue that, to have an actual impact on victims' positions, transitional justice strategies need to integrate mechanisms to address all human rights, including violations of economic, social and cultural rights (herein ESCRs).<sup>239</sup> Transformative justice theories have faced criticism and have been questioned for being thin on conceptual inspiration and making a limited impact in practice.<sup>240</sup> In fact, some commentators have argued that these theories seek to fundamentally change the priorities of transitional justice by challenging 'unequal and intersecting power relationships and structures of exclusion at both the local and the global level'.<sup>241</sup> Others are concerned about transitional justice becoming 'analytically overstretched and impractical'<sup>242</sup> if it tries to include too much, so goals of social justice may be better left to other fields, such as development policies.<sup>243</sup> Duthie, for instance, argues that even if transitional justice as a field should become 'development sensitive', it is debatable whether such linkages would be transformative enough.<sup>244</sup> In this same line, it should be asked whether such transformative initiatives will promote social unrest in already unstable societies in transition. Be that as it may, scholarship and

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Violations: Between Corrective and Distributive Justice', *Netherlands Quarterly of Human Rights*, no. 27, 2009, pp. 625–648.

<sup>238</sup> Primarily related to body integrity and property rights, and therefore included in the category of civil and political rights. We further analyse the traditional invisibility of ESCR's rights in the transitional justice process in chapter two.

<sup>239</sup> See for instance, Lambourne, W., 'Transformative justice, reconciliation and peacebuilding', *op. cit.* p.28; Laplante, L.J., 'On the Indivisibility of Rights: Truth Commissions, Reparations and the Right to Development', *Yale Human Rights and Development Law Journal*, vol.10, no.1, 2007, p. 141; Szoke-Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *op.cit.*, p. 471.

<sup>240</sup> McGonigle Leyh, B., 'The Socialisation of Transitional Justice: expanding justice theories within the field', *op. cit.*, p.92.

<sup>241</sup> Gready, P. and Robins, S., 'From Transitional to Transformative Justice: A New Agenda for Practice', *The International Journal of Transitional Justice*, vol.8, no.3, 2014, p. 347.

<sup>242</sup> See for instance, Waldorf, L., 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', *Social and Legal Studies*, vol. 21, no. 2, 2012, p. 179; or Mani, R., Editorial: Dilemmas of expanding Transitional Justice, or forging the Nexus between Transitional Justice and Development', *op. cit.*, p.255.

<sup>243</sup> McGonigle Leyh, B., 'The Socialisation of Transitional Justice: expanding justice theories within the field', *op. cit.*, p. 94.

<sup>244</sup> See Duthie, R., 'Towards a Development-sensitive Approach to Transitional Justice', *International Journal of Transitional Justice*, vol. 2, no.3, 2008, p. 292.

practitioners have been lately calling for a broad framework, moving towards the integration of social aspects in transitional justice. As McGonigle notes, however, this call is still largely aspirational and significant empirical data is needed.<sup>245</sup> Hence, research could examine how and which transitional justice mechanisms would be able to integrate ESCRs violations, according to the needs and priorities of each transitional justice process.

## **I.6 Sociopolitical elements of transitional justice processes.**

There are many aspects which significantly interplay in transitional contexts, from the duration of the conflict or the authoritarian regime to the intensity and type of violent repression. Those elements certainly have an impact on how the transitional justice process is further developed. For instance, in cases like Spain and Brazil, repression was hardest early on. Consequently, at transition, the passage of time had blurred the memories of what had happened, and also in many cases, direct victims or their families were no longer around to foster accountability for past abuses.<sup>246</sup>

Furthermore, in cases where repression was particularly virulent, prosecutions of perpetrators are more likely to take place, and thus, political pacts between opposing actors are quite rare.<sup>247</sup> In this sense, Panizza noted that in Latin America, 'the massive and unprecedented nature' of the abuses 'made human rights a crucial component of public debate in the region'.<sup>248</sup> Similarly, the political transition and democratisation processes shape the upcoming transitional justice process. According to Lessa, recent waves of democratisation have followed three patterns: collapse, negotiation or transformation.<sup>249</sup>

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<sup>245</sup> McGonigle Leyh, B., 'The Socialisation of Transitional Justice: expanding justice theories within the field', *op. cit.*, p. 94.

<sup>246</sup> Lessa, F., *The Missing Memory of Transitional Justice: How Argentina and Uruguay confronted past evils, 1983-2009.*, PhD Thesis defended at London School of Economics, 2009, p. 46. Document available at <http://etheses.lse.ac.uk/2052/> accessed 26 March 2018.

<sup>247</sup> *Ibid.*

<sup>248</sup> Panizza, F., 'Human Rights in the Processes of Transition and Consolidation of Democracy in Latin America', *op. cit.*, p.169.

<sup>249</sup> Lessa, F., *The Missing Memory of Transitional Justice: How Argentina and Uruguay confronted past evils, 1983-2009, op. cit.*, p.50. Lessa also notes that others scholars have referred to these patterns as transformation, rupture and negotiation.

In situations of collapse, the old regime has often been weakened almost to the point of disintegration, so few political constraints exist which facilitates accountability initiatives. Collapsing can be related to different causes<sup>250</sup> but the main consequence is that the old regime is discredited.<sup>251</sup> Usually, this means that accountability initiatives proliferate, as the former government does not have the power to prevent it, but there can be exceptions.<sup>252</sup>

In contrast, transitions by negotiation or by transformation are considered the least favourable to accountability issues. As happened in Spain, for instance, the new government is unlikely to develop accountability policies for past crimes as the outgoing regime often retains a significant power to threaten democratic consolidation.<sup>253</sup> Thus, in transitions by negotiation or transformation, members of the previous regime are still able to impose limitations about the democratisation process and how to deal with the past events. Negotiated transitions imply pacts and agreements between the former and the new government, usually addressing key details of the transition process. That means that the outgoing regime is still able to establish and even impose the terms of transition.<sup>254</sup>

On the other hand, in transitions by transformations, the former government decides to gradually open up in an attempt to evolve into a democracy. It usually culminates with free elections. Consequently, the members of the old government remain powerful throughout the process and even after the democracy is installed.<sup>255</sup>

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<sup>250</sup> For instance, due to loss of internal legitimacy, foreign intervention or defeat in an external war, as was the case of Argentina as we further analyse in Chapter V and VI of this thesis.

<sup>251</sup> Lessa, F., *The Missing Memory of Transitional Justice: How Argentina and Uruguay confronted past evils, 1983-2009*, *op. cit.*, p.51.

<sup>252</sup> If the former regime still has many supporters within the society or an important power in some State institutions, particularly the military forces, as happened in Argentina in the first stages of the democratisation process. Indeed, during Alfonsín and Menem's government, military forces were pushing the government to not adopt accountability policies.

<sup>253</sup> Calhoun, N., *Dilemmas of Justice in Eastern Europe's Democratic Transitions*, Palgrave Macmillan, 2004, pp.14-15; see also Gómez Isa, F., and Márquez Carrasco, C., 'Spain: from Totalitarianism to Fulfilment', in *60 Years of the Universal Declaration of Human Rights in Europe*, Intersentia, 2009, pp. 247-261.

<sup>254</sup> Calhoun, N., *Dilemmas of Justice in Eastern Europe's Democratic Transitions*, *op. cit.*, p.14.

<sup>255</sup> *Ibid.*

With regard to the democratisation process and its legal status, Nino categorizes them as continuous, legal breakdown/rupture, and legal restoration.<sup>256</sup> In the first case, accountability appears to be harder as human rights abuses have been usually legally protected at the time of commission, and afterwards by amnesty laws or other similar provisions. Regarding the cases of legal breakdown or rupture, former government actions can be prosecuted retroactively and amnesties can be disregarded, as happened after the Second World War in Germany and Japan.<sup>257</sup> Lastly, in cases of legal restoration, accountability policies may present an ‘intermediate degree of difficulty’ as new political restraints may arise as a consequence of the restoration of earlier democratic laws.<sup>258</sup>

## **I.7 Intermediate conclusions**

This chapter explored the notion and evolution of transitional justice as a field, focusing on its defining features and its main processes and mechanisms. Transitional justice is not a static field, but on the contrary, is in constant development and being adapted to the arising challenges of the new situations. The employment of diverse mechanisms depending on the specific transitional justice process itself reflects internal and international political, historical and sociocultural dynamics unique to each particular context. Indeed, implications of IHRL and Public International Law have been evidenced, particularly with regard to the justice process.

While criminal prosecutions are undeniably relevant, there are also other mechanisms to discover and deal with a violent past. Indeed, legal process could be more accurate when examining and evaluating the evidence but it has been contended that the narrow focus of the legal process could produce a limited truth. Therefore, mechanisms such as TRCs can potentially provide a broad picture of past events. Other mechanisms such as economic reparations have proof to alleviate victims’ harm and even contribute to transformative effects, although resources are frequently limited due to budgetary constraints. Institutional reform can also contribute to recover State institutions, as well as to restore trust in them. However, this task is often hampered by

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<sup>256</sup> Nino, C. S., *Radical Evil on Trial*, Yale University Press, 1996, p. 120.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*



the lack of political will to carry out the political and structural reforms needed, particularly when reforms might also entail accountability initiatives.

It has also been suggested that political variables and several actors certainly influence the design and implementation of transitional justice strategies. Consequently, different approaches and theories have been developed and implemented depending on the specific circumstances of each transitional justice process. While retributive justice inspired the first transitional justice theories, it was revealed that only judging and punishing perpetrators does not contribute to alleviating victims' harm or the situation in which the abuse has left them. Therefore, other theories emerge, such as restorative justice and reparative justice, which focus on restitution and reparation as the main goal of justice. However, these last theories still present many limitations, such as a narrow focus on reconciliation at the expense of victims' redress, as well as financial constraints to implement economic reparations. Ultimately, several commentators contended that social justice should be included in transitional justice processes, which has led to a new approach called transformative justice. While this approach implies addressing all human rights, including violations of ESCRs, they have been questioned for being thin on conceptual inspiration and making a limited impact in practice. It has been argued that moving towards the integration of social aspects in transitional justice would be desirable, so research could examine how and which transitional justice mechanisms would be able to integrate ESCRs violations, according to the needs and priorities of each transitional justice process.

Despite those specificities, there are also many elements in common within different transitional justice processes. Thus, previous experiences can serve as models, and mechanisms used there can be adapted to the specific contexts and challenges for new cases in the future.

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## II. CHAPTER TWO– ESCRs in Transitional Justice

### II.1 Introduction

Transitional justice programmes have been traditionally focused on CPRs violations and therefore have largely ignored violations of ESCRs. These rights and socioeconomic elements of conflict or authoritarianism more generally were simply relegated to the background issues.<sup>259</sup> Socioeconomic grievances however often appear as relevant aspects to the past violent dynamics, so considering them can potentially provide a deeper understanding of the root causes of conflict, as well as helping to reduce the chances of recurrence in the future.<sup>260</sup> Indeed, many conflicts and dictatorial regimes are often fueled by socioeconomic injustices, and frequently involve ESCRs violations. For instance, the riots in Tunisia and Egypt that ultimately led to large-scale violence had expressed socioeconomic concerns, such as unemployment and corruption.<sup>261</sup> Likewise, pursuing neo-liberal economic policies by most of the military regimes in Latin America was found to be closely linked to violations of ESCRs, particularly regarding trade unionists and leftist activists who became the main target for repression.<sup>262</sup> Notwithstanding these considerations, many commentators advocate caution about including ESCRs within transitional justice strategies, arguing that addressing ESCRs in such contexts could jeopardise the whole transitional justice

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<sup>259</sup> See for instance, Sharp, D.N., ‘Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice’, *Fordham International Law Journal*, vol.35, 2012, p. 780; Calvet Martínez, E., ‘La exigibilidad de los derechos económicos, sociales y culturales en situaciones de post-conflicto y en procesos de justicia transicional’, in Bonet Pérez, J. and Alija Fernández, R.A., *La exigibilidad de los derechos económicos, sociales y culturales en la Sociedad Internacional del siglo XXI: una aproximación jurídica desde el Derecho internacional*, Marcial Pons, 2016, p.199.

<sup>260</sup> Szoke-Burke, S., ‘Not Only ‘Context’: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights’, *op. cit.*, p.469-470.

<sup>261</sup> See Muñoz Nogal, E. and Gómez Isa, F., ‘¡Pan, Libertad, Justicia Social! Las revueltas populares de Túnez y Egipto y la defensa de derechos económicos y sociales’, in Bonet Pérez, J. and Alija Fernández, R.A., *La exigibilidad de los derechos económicos, sociales y culturales en la Sociedad Internacional del siglo XXI: una aproximación jurídica desde el Derecho internacional*, *op.cit.* pp.219-241.

<sup>262</sup> Hecht, L. and Michalowski, S., ‘The Economic and Social Dimensions of Transitional Justice’, *op. cit.*, p.3.

programme, being too broad and ambitious.<sup>263</sup> Similarly, there are also concerns about the suitability of current transitional justice mechanisms and tools to do this task.

This chapter explores the contents and scope of ESCRs in relation to this debate. It then seeks to refute those concerns by outlining that some misconceptions and conceptual confusion occurred when trying to address ESCRs in transitional justice processes. Certainly, ESCRs are just one element of the socioeconomic dimension of transitional justice and State failures to respect and protect them can be relatively straightforward to address within the existing transitional justice tools. Prioritising which particular ESCRs should be addressed would ultimately depend on the specific context, including the nature of past violations and the resource constraints of transitional justice institutions.<sup>264</sup> Whereas it would be unrealistic to expect that the inclusion of ESCRs will resolve the full extent of the socioeconomic challenges at stake in post-conflict or post-authoritarian situations, this author argues that addressing specific ESCRs depending on the particular context, could contribute towards such broader goals. This chapter thus also explores how ESCRs can be potentially addressed by the existing transitional justice mechanisms, as well as providing some examples of how it has already been done in certain transitional justice processes.

While using the abbreviation of the usual grouping of economic, social and cultural rights (ESCRs), this chapter will primarily focus on economic and social rights violations, to the exclusion of cultural rights violations. This approach is based on the assumption that economic and social rights are most closely aligned to projects of development and they are, consequently, often argued to be outside the bounds of transitional justice.<sup>265</sup> Specifically, this chapter takes labour rights as reference, and particularly, the right to form and join trade unions and the right to collective bargain. It seeks then to analyse their nature as ESCRs and the contents of the corresponding State obligations. Given that this work focuses on the role of corporations and their primary

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<sup>263</sup> About criticisms on this inclusion, see Chapter I.5, when analysing transformative justice theories.

<sup>264</sup> Szoke-Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *op. cit.*, 473.

<sup>265</sup> See for instance Schmid, E., and Nolan, A., 'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice', *The International Journal of Transitional Justice*, vol. 27, no. 3, 2014, pp. 362-382; or Szoke-Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *op. cit.* p. 468.

domain of activity is economic, links between their operations and the enjoyment of ESCRs are hardly refutable.

## II.2 Contextualising ESCRs in international law

ESCRs are part of the universal human rights legal framework in which all rights are ‘universal, indivisible and interdependent and interrelated’.<sup>266</sup> As well as CPRs rights, ESCRs aim to protect human dignity by establishing both positive and negative obligations for States. These obligations include a range of minimum conditions required for people to live in a dignified way, to ensure freedom from fear and want, and the commitment of continuous improvement of living conditions.<sup>267</sup>

While providing an exhaustive account of ESCRs is beyond the scope of this study, it hereunder presents an overview of such rights and the obligations they impose.<sup>268</sup> ESCRs have been categorised in different ways with regard to the State obligations. The ‘tripartite typology’ of ‘respect, protect and fulfil’ is the most commonly used.<sup>269</sup> This notion includes the obligation to respect, which prohibits the State from interfering with existing enjoyment of rights; the obligation to protect, which compels the State to ensure that non-State actors do not interfere in the population’s enjoyment of these rights; and the obligation to fulfil, which implies that State parties are required to take whatever measures are needed to overcome obstacles to the full enjoyment of those rights. Thus, ESCRs impose a combination of positive and negative State obligations. ESCRs are fully recognised in international human rights law, such as the 1948 Universal Declaration of Human Rights<sup>270</sup> and the 1966 International

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<sup>266</sup> Vienna Declaration and Programme of Action (A/CONF.157/24 (Part I), chap. III, para. 5.

<sup>267</sup> Preamble to the International Covenant on Economic, Social and Cultural Rights. Document available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> accessed 21 March 2018.

<sup>268</sup> For an overview of ESCRs obligations under ICESCR, see, for instance., Sepúlveda, M., *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights*, Intersentia, 2003.

<sup>269</sup> Schmid, E., and Nolan, A., “Do No Harm”? Exploring the Scope of Economic and Social Rights in Transitional Justice’, *op. cit.*, p.5.

<sup>270</sup> Universal Declaration of Human Rights, 1948. Arts. 22–27

Covenant on Economic, Social and Cultural Rights.<sup>271</sup> The latest normative development in the field has been the adoption in December 2008 of the Optional Protocol to the International Covenant on ESCRs.<sup>272</sup> However, the treaties do not fully explain the content of those rights, so the scope of each economic, social and cultural right is in need of further explanation. This interpretation task is usually done by authoritative bodies such as the Committee on Economic, Social and Cultural Rights and other human rights treaty bodies and special procedures.

According to article 2 (1) of the Covenant:

‘each State Party ... undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively the full realization of the rights* recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’ (emphasis added).

In this regard, the concept of progressive realisation of ESCRs constitutes a key aspect of States’ obligations in this field. While it draws on the premise that the full realisation of those rights cannot always be achieved immediately and might need time, it requires States to take appropriate measures in order to pursue the full realisation of these rights with all the available resources at their disposal.<sup>273</sup> Consequently, realisation of these rights can be hampered by lack of resources.<sup>274</sup> Equally, it means that States’ compliance with their obligation to take appropriate measures is assessed in the light of the resources available to them.<sup>275</sup>

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<sup>271</sup> For further information about the full legal framework see ‘Economic, Social and Cultural Rights, Handbook for National Human Rights Institutions’, United Nations, 2005. Available at <http://www.ohchr.org/Documents/Publications/training12en.pdf> accessed 22 March 2018.

<sup>272</sup> Optional Protocol to the International Covenant on ESCRs. UNGA Res. 63/117, 2008. It entered into force on May 2013; three months after the tenth State ratified it.

<sup>273</sup> See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of the State parties’ obligations, paras. 4 and 9. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fG\\_EC%2f4758&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fG_EC%2f4758&Lang=en) accessed 26 March 2018.

<sup>274</sup> However, some of the rights included in the Covenant can be characterized as freedoms—for example, freedom of association and the right to join trade unions—which are of immediate effect and are not particularly resource-intensive.

<sup>275</sup> Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of the State parties’ obligations, paras. 1 and 9.

Notwithstanding the above mentioned, it should be noted that not all the obligations regarding ESCRs are progressive. The Committee has clearly claimed that States also have immediate obligations, such as the obligation to take deliberate, targeted and concrete steps towards the realization of these rights, the prohibition of discrimination and the prohibition to adopt retrogressive measures, to mention some examples.<sup>276</sup> Similarly, State parties have the obligation to protect individuals from interference by third parties in the enjoyment of their rights -such as corporations- and this obligation is generally of immediate effect.<sup>277</sup>

International human rights law is still essentially State-centred. But, while only States are parties to the existing human rights treaties – so they have the primary responsibility to promote and secure their fulfilment - they are not the only actors involved. Individuals, local communities, trade unions, civil society and corporations have responsibilities regarding the realisation of ESCRs.<sup>278</sup> As a minimum standard, Non State Actors (NSAs) must respect the human rights obligations of States.<sup>279</sup> Respecting them requires NSAs not to adopt, and to repeal laws or policies, administrative measures and programmes that do not conform to States' human rights obligations, including those concerning ESCRs.<sup>280</sup>

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<sup>276</sup> Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of the State parties' obligations, paras. 1–5 and 10.

<sup>277</sup> See for instance, Gibney, M., and Vandenhoe, W. (Eds.), *Litigating Transnational Human Rights Obligations. Alternative Judgments*, Routledge, 2014. p. 269. Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of the State parties' obligations, paras. 1, 5 and 9. See also, OHCHR Publication, 'Transitional Justice and Economic, Social and Cultural Rights', HR/PUB/13/5, United Nations, 2014. p.11. Available at <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf> accessed 27 March 2018.

<sup>278</sup> In this regard, it should be noted that both Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), and the Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural rights (2001) reaffirm the State's obligation to protect, which includes the State's responsibility to ensure that private entities or individuals, including corporations over which they exercise jurisdiction, do not deprive individuals of their ESCR.

<sup>279</sup> Ssenyonjo, M., *Economic, Social and Cultural Rights in International Law*, Hart Publishing, 2009, p. 126; Specifically on businesses, see also the United Nations Guiding Principles, endorsed by the Human Rights Council in its resolution 17/4.

of 16 June 2011

<sup>280</sup> *Ibid.*

While various international and regional mechanisms have been established to monitor States' compliance, justiciability of ESCRs still presents many challenges.<sup>281</sup> At international level, the Committee on Economic, Social and Cultural Rights monitors the compliance of State parties with their obligations under the Covenant. The Committee reviews their periodic reports and issues concluding observations and recommendations. With the entry into force of the Optional Protocol to the Covenant in May 2013, the Committee can also hear individual complaints and initiate inquiry procedures regarding alleged violations of the Covenant (ICESCR).

At the regional level, both the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights have the competence *ratione materiae* to raise the legal enforceability of the ESCRs catalog recognized within their jurisdiction.<sup>282</sup> By contrast, the ECtHR is limited in this sense, given that the European Convention on Human Rights and their Additional Protocols recognise ESCRs in a more restricted manner.<sup>283</sup> While the European Social Charter allows the reporting of collective complaints for ESCRs,<sup>284</sup> only certain non-governmental organisations are entitled to lodge collective complaints concerning the Charter and individuals are not entitled to do so. On the other hand, the use of regional and domestic courts and quasi-judicial mechanisms has significantly increased in the last decades,<sup>285</sup> which has

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<sup>281</sup> Saura Estapà, J., 'La exigibilidad jurídica internacional de los derechos humanos: especial referencia a los derechos económicos, sociales y culturales', in Bonet Pérez, J., and Saura Estapà, J.(eds), *El derecho Internacional de los derechos humanos en periodos de crisis. Estudios desde la perspectiva de su aplicabilidad*, Marcial Pons, 2013, p.59.

<sup>282</sup> In the Inter-American system this is based in art. 62, relating arts. 44 and 45 of the American Convention of Human Rights of 1969, and the article 19 of Additional Protocol to the American Convention on Human Rights in the area of ESCRs of 1988. (Protocolo de San Salvador). In the African system, arts. 3 and 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights of 1988, in relation to arts. 47 and 55 of the African Charter on Human and Peoples' Rights of 1981.

<sup>283</sup> Bonet Pérez, J., 'Introducción general: presupuestos y dinamismo evolutivo de la exigibilidad jurídica internacional de los derechos económicos, sociales y culturales', in Bonet Pérez, J., and Alija Fernández, R.A., *La exigibilidad de los derechos económicos, sociales y culturales en la Sociedad Internacional del siglo XXI: una aproximación jurídica desde el Derecho internacional*, *op.cit.*, p. 18.

<sup>284</sup> The Collective Complaints procedure was introduced by the Additional Protocol in 1995.

<sup>285</sup> See for instance the communications system of the ICESCRs or the complaints system of the European Social Charter, both of them coordinated by the corresponding Committees.



contributed to overcoming the traditional scepticism about the justiciability of ESCRs.<sup>286</sup>

### **II.3 Labour rights as ESCRs: a particular focus on freedom of association at the workplace**

#### **II.3. A Labour rights as human rights**

The question of whether labour rights must be considered as human rights has given rise to heated debates. While in human rights law and labour law scholarship some endorse the character of labour rights as human rights without hesitation,<sup>287</sup> others view it with skepticism and suspicion.<sup>288</sup> Attending to their definitions, while human rights are universal and possessed by all human beings by virtue of their humanity, labour rights can be defined as the set of rights that humans possess by virtue of their status as workers.<sup>289</sup> Notwithstanding that, some scholars have argued that workers should not be viewed as economic interests, but rather as bearers of fundamental human rights.<sup>290</sup>

In 1998, the International Labor Organization (ILO) famously generated the Fundamental Declaration on Principles and Rights at Work (Fundamental Declaration).<sup>291</sup> The Fundamental Declaration was partly an attempt to achieve a degree of moral, political, and legal consensus on what constitutes universally recognized labor rights. It asserts that all member States of the ILO, regardless of which specific labour

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<sup>286</sup> Langford, M., 'The justiciability of social rights: from practice to theory', in Langford, M. (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008.

<sup>287</sup> See for instance, Canessa Montejo, M.F., 'Los Derechos Humanos Laborales en el Derechos Internacional', *Revista Latinoamericana de derechos humanos*, vol. 23, no.1, 2012, pp. 115-144.; Drzewicki, K., 'The right to work and Rights in Work', *Economic, Social and Cultural Rights*, Kluwer, 2001, 2 edition, p 223; Ssenyonjo, M., 'Economic Social and Cultural Rights: An Examination of State Obligations', in Joseph and McBeth (eds.), *Research Handbook on International Human Rights Law*, Edward Elgar, 2010, p. 36.

<sup>288</sup> Mantouvalou, V., 'Are Labour Rights Human Rights?', *European Labour Law Journal*, 2012.p.1

<sup>289</sup> Kolben, K., 'Labor Rights as Human Rights?', *Virginia Journal of International Law*, vol. 50, no.2, 2010, p.453.

<sup>290</sup> See for instance, Adams, R., 'Labor's Human Rights: A Review of the Nature and Status of Core Labor Rights as Human Rights', *Human Rights and Human Welfare*, Working Paper n°36, 2006.

<sup>291</sup> Full document available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_467653.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf) accessed 28 March 2018.

conventions they have ratified, are bound by a set of four ‘core labour standards’, consisting of freedom of association, freedom from forced labour and from child labour and non-discrimination in employment.

These enumerated rights differ from the broader conception in part because they do not necessarily require a given level of economic advancement. Some scholars, however, state that such a narrow conception of labour rights is limiting, and favor a more expansive account of labour rights. They argue that the entire corpus of rights, as embodied in the essential international human rights conventions and the ILO’s conventions and jurisprudence, ought to be treated as fundamental and co-equal labor rights.<sup>292</sup> These rights include not only the civil and political rights highlighted in the Fundamental Declaration, but also the so-called ‘social rights’, such as the right to ‘full and productive employment’ as provided for in the International Covenant on Economic, Social, and Cultural Rights,<sup>293</sup> and the labour-related social rights included in the Universal Declaration of Human Rights (UDHR).<sup>294</sup> These scholars are opposed to the Fundamental Declaration because they argue that it excludes a number of what they consider economic and social rights, such as the minimum wage and health and safety standards.<sup>295</sup>

By contrast, Langille and Maupain, noted international labour lawyers, argue that the heartland of labour rights is the core of ‘procedural’ or ‘enabling’ rights.<sup>296</sup> In particular, Langille argues that labour law and labour lawyers differentiate between labour rights, which are procedural in nature and labour standards, which are outcome-

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<sup>292</sup> See for instance Alston, P., ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime’, *European Journal of International Law*, no.15, 2004, p. 457. See also Alston, P., and Heenan, J., ‘Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?’, *New York University Journal of International Law and Politics*, no.36, 2004, p. 221.

<sup>293</sup> International Covenant on Economic, Social, and Cultural Rights (herein after ICESCR), 1966. Art. 6.

<sup>294</sup> These rights include the right to work, free choice of employment, just and favorable conditions of work, and protection against unemployment. Universal Declaration of Human Rights. U.N. Doc. A/810, 1948.

<sup>295</sup> Alston, P., and Heenan, J., ‘Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?’, *op.cit.*, p. 253–256.

<sup>296</sup> Langille, B., ‘Core Labour Rights—The True Story (Response to Alston)’, *European Journal of International Law*, vol. 16.3, 2005, pp. 409-429; Maupain, F., ‘Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights’, *European Journal of International Law*, vol. 16.3, 2005, pp. 439-448.

based.<sup>297</sup> Some components of labour regulation provide rights to workers that guarantee processes, such as freedom of association and collective bargaining, while other components might prescribe substantive standards that employers must meet, such as specified levels of health and safety and wages.<sup>298</sup> Langille accuses Alston of conflating these two concepts and argues that the Fundamental Declaration is coherent and desirable because it takes an approach to labour law and labour rights that emphasizes worker agency.<sup>299</sup>

All positions considered, what seems to be undeniable is that certain labour rights are compelling, stringent, universal and timeless entitlements, as much as some civil and political rights such as the right to privacy or the prohibition of slavery. The recognition that certain labour rights are human rights does not imply that human rights exhaust labour law as a field of study but that some labour rights are stringent normative entitlements.<sup>300</sup> Indeed, a number of labour rights have been codified in human rights instruments, such as the ICESCR.<sup>301</sup>

With regard to the International labour standards, it is worth mentioning that the ILO regularly examines the application of standards in member States and points out areas where they could be better applied. If there are any problems in the application of standards, the ILO seeks to assist countries through social dialogue and technical assistance. The ILO has developed various means of supervising the application of Conventions and Recommendations in law and practice, following their adoption by the International Labour Conference and their ratification by States. On the one hand, there is the regular system of supervision, which includes examination of periodic reports, submitted by member States on the measures they have taken to implement the provisions of the ratified Conventions.<sup>302</sup> On the other hand, there are the special

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<sup>297</sup> Langille, *Ibid.* pp. 428-29

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.* p. 431.

<sup>300</sup> Mantouvalou, V., 'Are Labour Rights Human Rights?', *op.cit.*, p.27.

<sup>301</sup> For instance, the right of everyone to the enjoyment of just and favourable conditions of work (article 7) and the right of everyone to form trade unions and join the trade union, as well as the right to strike (article 8).

<sup>302</sup> Examination by two ILO bodies of reports on the application in law and practice sent by member States and on observations in this regard sent by workers' organizations and employers' organizations.

procedures, which are based on the submission of a representation or a complaint.<sup>303</sup> In addition, the Committee of Experts publishes an in-depth annual General Survey on member States' national law and practice, on a subject chosen by the Governing Body. These surveys are established mainly on the basis of reports received from member States and information transmitted by employers' and workers' organisations. They allow the Committee of Experts to examine the impact of conventions and recommendations, to analyse the difficulties indicated by governments as impeding their application, and to identify means of overcoming these obstacles.

### **II.3.B Freedom of association at the workplace: the right to form and join trade unions and the right to collective bargain**

The right to form and join trade unions belongs to a larger group or category, namely the right to freedom of association. Recognised in the article 20 of the UDHR, this provision reveals that 'everyone has the right to freedom of peaceful assembly and association' and 'no one may be compelled to belong to an association'.<sup>304</sup> The right to freedom of association is the right to associate for social, political, religious or industrial reasons.<sup>305</sup> Whether freedom of association is an individual right not to associate, or involves interrelated rights of a more collective nature, has been the subject of fierce debate both on a domestic and international level.<sup>306</sup>

At the workplace, freedom of association translates to the right to form and join trade unions and the right to collective bargain. The UDHR also expressly recognises 'The right to join trade unions and the right to collective bargaining' in its Article 23.4. A further recognition of this right can be found in the ICESCRs, article 8:

#### **1. The States Parties to the present Covenant undertake to ensure:**

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<sup>303</sup> These are the special procedures for representations on the application of ratified Conventions, the special procedure for complaints over the application of ratified Conventions and the special procedure for complaints regarding freedom of association through the Freedom of Association Committee.

<sup>304</sup> This right is also recognised in hard law instruments, such as the ICCPR (article 22), and regional treaties such as the ECHR (article 11).

<sup>305</sup> As it is enshrined in international instruments such as the International Covenant on Civil and Political Rights, adopted Dec.19, 1966.

<sup>306</sup> For a further debate, see for instance Owens, R., and Riley, J. and Murray, J., *The Law of Work*, Oxford University Press, 2007.

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.<sup>307</sup>

In addition, these rights have been recognized in the preamble to the Constitution of International Labour Organisation in 1919, at the end of World War I. The body's mission was based on the principles that labour is not merely a commodity and that social justice is necessary for world peace. A new preamble was adopted after World War II, when the ILO became a United Nations body, and freedom of association was again endorsed as a key method for attaining social justice and universal and lasting

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<sup>307</sup> ICESCRs, article 8.

peace.<sup>308</sup> Indeed, the obligation for member States to protect freedom of association is often regarded as a requirement of ILO membership.<sup>309</sup>

Two major conventions related to these rights have emerged out of the ILO system, namely the *Freedom of Association and Protection of the Right to Organise Convention (No 87)*<sup>310</sup> and the *Right to Organise and Collectively Bargain Convention (No 98)*.<sup>311</sup> These conventions define the scope of those rights in more detail. *Convention 87* provides protection to freedom of association in two key ways: firstly, providing protection for the right of workers and employers to form and join organizations, and secondly, it provides protection for the autonomy of these organizations, once established, to further the interests of its members.<sup>312</sup> *Convention 98*, to a significant extent, complements *Convention 87*, requiring that workers enjoy adequate protection against anti-union discrimination.<sup>313</sup>

A substantive function of *Convention 98* is to enable collective bargaining between employers and unions. Indeed, under article 4, State parties must take steps to encourage and promote collective agreement.<sup>314</sup> While neither of these conventions make express reference to the right to strike, supervisory bodies have taken the view that it is an integral aspect of freedom of association.<sup>315</sup> These treaties have also been complemented by later instruments dealing with the specific application of freedom of

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<sup>308</sup> Hutchinson, Z., 'The Right to Freedom of Association in the Workplace: Australia's Compliance with International Human Rights Law', *Pacific Basin Law Journal*, vol. 27, no.2, 2010, p.128.

<sup>309</sup> Creighton, B., 'Freedom of Association', in Blanpain, R (ed), *Comparative labour law and industrial relations in industrialized market economies*, Kluwer Law International, 2007, p. 275-276. The International Labour Organization (ILO) is the specialized U.N. body on issues of social justice and labor conditions. It has a distinctive tripartite structure whereby decisions are not only made by States but also by employers' and workers' representatives. Since its inception in 1919 it has adopted numerous conventions and recommendations dealing with labor rights. The ILO has one of the most highly developed supervisory systems in international human rights law. Under art. 22 of the ILO Constitution member States are required to send reports at regular intervals on their implementation of ILO recommendations, in addition to ILO conventions that they have ratified.

<sup>310</sup> Freedom of Association and Protection of the Right to organise Convention, adopted July 9, 1948.

<sup>311</sup> Right to Organise and Collective Bargaining Convention, adopted July 1, 1949.

<sup>312</sup> *Convention 87*, articles II-V.

<sup>313</sup> *Convention 98*, article I.

<sup>314</sup> *Convention 98*, article IV.

<sup>315</sup> ILO Committee of Experts on the Application of Conventions and Recommendations, Individual Observation concerning freedom of association and protection of the right to Organise Convention, ILO Doc 062009AUS087, 2009.

association in particular industries.<sup>316</sup> It is worth mentioning at this point that the ILO conventions and the jurisprudence of the treaty monitoring bodies have mainly been focused on the collective aspects of the right to freedom of association. However, a dichotomized view about the right as either 'individual' or 'collective' is overly simplistic as Hutchinson has pointed out.<sup>317</sup>

At the European level, the European Convention on Human Rights specifies trade union membership as an important right essential to democracy: 'everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests' (Article 11). In addition, the right to 'freedom of association in national or international organisations for the protection of their economic and social interests' and 'the right to bargain collectively' are enshrined in the European Social Charter, adopted in 1961.<sup>318</sup> This document was revised in 1996, when the rights of workers' representatives in undertakings were included.<sup>319</sup> On the other hand, the Charter of Fundamental Rights of the European Union recognises the right to fair and just working conditions (article 31) protection from unjustified dismissal (article 30) a guarantee of timely information and consultation (article 27) and to the right of collective bargaining and collective action including the right to strike (article 28).

The European Court of Human Rights set forth the main principles concerning trade union freedom in its judgment *National Union of Belgian Police v. Belgium*, 27 October 1975.<sup>320</sup> Therefore, the Court Stated that Article 11 safeguards the right to form

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<sup>316</sup> Labour relations (Public Service) Convention, Protection of the Right to Organise and Procedures for determining conditions of Employment in the public service, C151, ILO/ CONF.64, (June 27, 1978); Workers' Representative Convention, Protection and Facilities to be afforded to Workers' Representatives in the Undertaking, C135, ILO/CONF.56 (June 23, 1971); Rural workers' organisations Convention, Organisation of rural workers and their role in economic and social development, C141, ILO/CONF.60 (June 23, 1975).

<sup>317</sup> The ILO Conventions clearly recognise the right as simultaneously individual and collective in key areas. For instance, provisions prohibiting discrimination on the basis of union membership are directly enjoyed by individuals as well as groups or organisations.

<sup>318</sup> Part I, point 5 and 6.

<sup>319</sup> Part I, point 21.

<sup>320</sup> ECtHR, *National Union of Belgian Police v. Belgium*, Merits, just satisfaction, App no 4464/70 (A/19), (1979-80). In this case, the applicant trade union complained that the Belgian Government had not recognised it as one of the most representative organisations which the Ministry of the Interior was required by law to consult. The Court held that there had been no violation of Article 11 of the Convention, finding that the applicant trade union had other means of acting *vis -à-vis* the government,

a trade union and to join the trade union of one's choice; the right to be heard and 'freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible'. Similarly, the Grand Chamber identifies the very essence of this right in its judgement *Demir and Baykara v. Turkey*, 12 November 2008.<sup>321</sup> The Court held that the restrictions imposed on the three groups mentioned in Article 11, namely members of the armed forces, of the police or of the administration of the State, were to be confined to the 'exercise' of the rights in question. Therefore, such restrictions could not impair the very essence of the right to organise. The Court also noted that the development of its case-law regarding the right of association enshrined in Article 11 was shaped by two guiding principles: firstly, the Court took into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, allowing for its margin of appreciation; secondly, the Court did not accept restrictions that affected the essential elements of trade-union freedom, without which that freedom would become devoid of substance. Given that these two principles were correlated, this implied that the State was under an obligation to take account of the elements regarded as essential by the Court's case-law.<sup>322</sup>

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besides consultations with the Ministry of the Interior. The Court further considered that Belgium's general policy of restricting the number of organisations to be consulted was not in itself incompatible with trade union freedom and was a matter for the State's discretion.

<sup>321</sup> ECtHR, *Demir and Baykara v. Turkey*, Merits and just satisfaction, App no 34503/97, (2009) 48 EHRR 54, IHRL 3281. The case concerned the failure by the Court of Cassation in 1995 to recognise the applicants' right, as municipal civil servants, to form trade unions, and the annulment of a collective agreement between their union and the employing authority. The trade union *Tüm Bel Sen* was founded in 1990 by civil servants from various municipalities. In 1993, the trade union entered into a collective agreement with Gaziantep Municipal Council regulating all aspects of the working conditions of the Council's employees, including salaries, benefits and welfare services. Considering that the Council had failed to fulfil certain of its obligations under the agreement, the trade union brought proceedings against it in the Turkish civil courts. It won its case in the Gaziantep District Court, which found in particular that although there were no express statutory provisions recognising a right for trade unions formed by civil servants to enter into collective agreements, this lacuna had to be filled by reference to international treaties such as the conventions of the International Labour Organisation (ILO) which had already been ratified by Turkey and which, by virtue of the Constitution, was directly applicable in domestic law. However, on 6 December 1995 the Court of Cassation ruled that in the absence of specific legislation, the freedom to join a trade union and to bargain collectively could not be exercised. It contended that, at the time the union was founded, the Turkish legislation in force did not permit civil servants to form trade unions. It concluded that *Tüm Bel Sen* had never enjoyed legal personality, and therefore did not have the capacity to take or defend court proceedings.

<sup>322</sup> *Ibid.*, para. 140-170.



On the other hand, the American Convention on Human Rights (*Pacto de San José*, Costa Rica)<sup>323</sup> also contains the right to freedom of association in a general way in its article 16. Further and specific recognition can be found in the Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador) that contains references to ESCRs. Article 8 of this Additional Protocol specifically refers to Trade Unions Rights in the following terms:

1. The States Parties shall ensure:
  - a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;
  - b. The right to strike.
2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.
3. No one may be compelled to belong to a trade union.

The Inter-American Court of Human Rights has recently recognised the elevated status of Trade Unions to access the Inter-American system.<sup>324</sup> By unanimously concluding that legal entities do not have the standing to directly access the Inter-American system in a contentious process as presumptive victims, the Court explicitly

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<sup>323</sup>American Convention on Human Rights, adopted in November 1969. Full document available at: [https://www.oas.org/dil/esp/tratados\\_b-32\\_convencion\\_americana\\_sobre\\_derechos\\_humanos.htm](https://www.oas.org/dil/esp/tratados_b-32_convencion_americana_sobre_derechos_humanos.htm) accessed 28 March 2018.

<sup>324</sup>Cornell, A.B., 'Inter-American Court Recognizes Elevated Status of Trade Unions, Rejects Standing of Corporations', Cornell University Law School, vol. 3, 2017, pp. 39-44.

excludes corporations.<sup>325</sup> The Court determined that access is limited to human beings, with only two exceptions: trade unions and indigenous communities. The standing of trade unions in the Inter-American system of Human Rights has been solidified in Advisory Opinion OC-22, which recognizes the importance of trade unions as indispensable to safeguarding the rights of workers to organize and advance their interests. Likewise, trade unions are also entitled to lodge collective complaints of the European Committee of Social Rights.<sup>326</sup>

This decision builds on the Inter-American Court's other significant rulings that advance fundamental labour rights, including *Baena-Ricardo et al. v Panama*, in which it affirmed that 'freedom of association is of the utmost importance for the defense of the legitimate interests of workers, and falls under the *corpus juris* of human rights.' In this case, the Court recognised the crucial role of trade unions in the realization of freedom of association, stating that 'freedom of association consists basically of the ability to constitute trade union organizations, and to set in motion their internal structure, activities and action programme, without the intervention of public authorities.'<sup>327</sup>

Recently, in 2016, the United Nations released a report on the rights to freedom of peaceful assembly and of association in the workplace, presented to the 71<sup>st</sup> session of the general assembly.<sup>328</sup> The report, by the former Special Rapporteur Maina Kiai, finds that the growing concentration of corporate power weakens labour rights. Although States are required under international law to respect and promote workers' rights, the gained influence of multinational corporations means they often fail. Therefore, The Special Rapporteur recommends that businesses<sup>329</sup> meet their

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<sup>325</sup> IACtHR, 'The Standing of Legal Entities in the Inter-American Human Rights System', Advisory Opinion OC-22/16, 26 February 2016.

<sup>326</sup> While any State may also grant representative national non-governmental organisations within its jurisdiction the right to lodge complaints against it, only Finland has done it so far.

<sup>327</sup> IACtHR, *Baena Ricardo et al v Panama*, Merits, Reparations and Costs, Series C, No. 72, 2 February 2001, paras. 162, 170–72. See also Inter-American Court of Human Rights, *Huilca Tecse v Peru*, Preliminary Objections, Merits, Reparations and Costs, Series C, No. 121, 3 March 2005, para. 74.

<sup>328</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association. UN General Assembly A/71/385, 14 September 2016. Available at <http://undocs.org/A/71/385> accessed 28 March 2018. The report was simply transmitted to the members of the General Assembly by a note of the Secretary-General.

<sup>329</sup> Including employers, lead firms, subsidiaries, suppliers, franchisees or investors in supply chains.

obligations to respect those rights, including the right to strike; refrain from anti-union policies and practices; and implement the Guiding Principles on Business and Human Rights by, for instance, making policy commitments to respect peaceful assembly and association rights.<sup>330</sup>

Ultimately, the right to freedom of association at the workplace has come to be seen as an essential means for workers to defend their interests and express their concerns and protect their entitlements.<sup>331</sup> Some scholars have pointed out that the right to freedom of association and collective bargaining at the workplace is essential to ensure other human rights protection, such as the right to a decent standard of living.<sup>332</sup>

#### **II.4 Traditional invisibility of ESCRs in transitional justice contexts**

Together with international criminal law and international humanitarian law,<sup>333</sup> international human rights law remains the most frequently invoked legal framework of transitional justice scholarship and policymaking.<sup>334</sup> However, transitional justice –in both its institutional and scholarly dimensions- has historically focused on violations of CPRs and, hence, excluded socioeconomic aspects of conflict and authoritarianism, such as violations of ESCRs, structural violence, and development.<sup>335</sup> Nevertheless,

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<sup>330</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, *ibid.* para. 99

<sup>331</sup> See for instance, Swepston, L., 'International Labour Law', in *Comparative labour law and industrial relations in industrialized market economies, op.cit.*, p.137-146.

<sup>332</sup> See for instance, Gross, A., and Compa, L. (eds), *Human Rights in Labor and Employment Relations: International and Domestic Perspectives*, Cornell University Press, 2009.

<sup>333</sup> International humanitarian law has been mainly used in transitional contexts whose precedent was armed conflicts.

<sup>334</sup> See, for instance, the Statement of the UN Secretary General that 'the normative foundation for [the UN's] work in advancing the rule of law [in postconflict societies] is the Charter of the United Nations itself, together with international human rights law; international humanitarian law; international criminal law; and international refugee law.' 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,' UN Doc. S/2004/616 (23 August 2004), para. 9. Furthermore, a widely used scholarly definition of transitional justice States that this field 'aimed directly at confronting and dealing with past violations of human rights and humanitarian law.' Roht-Arriaza, N., 'The New Landscape of Transitional Justice,' in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, Roht-Arriaza, N. and Mariezcurrena, J.(Eds), Cambridge University Press, 2006, p.2.

<sup>335</sup> Indeed, socioeconomic considerations are almost totally absent in two of the most relevant works on transitional justice, such as Teitel, R., *Transitional Justice Genealogy, op.cit.*; Elster, J., *Closing the Books: Transitional Justice in Historical Perspective, op.cit.*

socioeconomic grievances often appear as significant elements of the violent past. In fact, several conflicts and dictatorial regimes are often fueled by socioeconomic injustices, and frequently involve ESCRs violations, so addressing these concerns could potentially provide a deeper understanding of the root causes of conflict, as well as reduce the chances of recurrence in the future.<sup>336</sup>

There are several reasons why transitional justice has historically tended to neglect economic and social wrongs.<sup>337</sup> On the one hand, transitional justice has been heavily influenced by human rights law and its longstanding bias towards civil and political rights, which have been considered as more justiciable rights.<sup>338</sup> Traditional conceptions considered that identifying violations, perpetrators, and remedies was easier when it comes to CPRs.<sup>339</sup> Similarly, the notion of ‘liberal peacebuilding’ has been often applied in transitional contexts, which supports the idea that political and economic liberalization promotes sustainable peace, based on the thinking that market democracies are less likely to get into conflict. According to critics of the concept, the two pillars of liberal peacebuilding are the promotion of free markets and the promotion of democracy.<sup>340</sup> Transitional justice therefore has often taken part in the globalised neoliberal agenda which has been largely ignoring ESCRs.<sup>341</sup> In addition, criminal justice, and particularly, international criminal law, has profoundly influenced the rise of transitional justice as a field. International criminal law mostly focuses on civil and political rights linked to bodily integrity,<sup>342</sup> such as torture and killings, and it emphasizes individual criminal responsibility rather than structural causes of conflict or

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<sup>336</sup> Szoke-Burke, S., ‘Not Only ‘Context’: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights’, *op. cit.*, p.469-470.

<sup>337</sup> Waldorf, L., ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’, *Journal of Social & Legal Studies*, vol. 21, no.2, 2012, p.173. See also on this topic, Roth-Arriaza, N., ‘Why was the Economic Dimension Missing for So Long in Transitional Justice? An Exploratory Essay’, in Verbitsky, H., and Bohoslavsky, J.P, *The Economic Accomplices to the Argentine Dictatorship. Outstanding Debts*, *op. cit.*, pp.19-28.

<sup>338</sup> Cahill-Ripley, A., ‘Foregrounding socio-economic rights in transitional justice: realising justice for violations of economic and social rights’, *Netherlands Quarterly of Human Rights*, vol. 32/ 2, 2014, pp. 187-188.

<sup>339</sup> Arbour, L., ‘Economic and social justice for societies in transition’, *op. cit.*, pp. 6-7. See supra note 24.

<sup>340</sup> Lekha Sriram, C., ‘Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?’, in D. N. Sharp (ed.), *Justice and Economic Violence in Transition*, *op.cit.*, p.30.

<sup>341</sup> Waldorf, L., ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’, *op.cit.*, p. 173.

<sup>342</sup> See Rome Statute of the International Criminal Court, 1998: articles 6–8.

repression.<sup>343</sup> Indeed, limitations imposed by a focus on prosecutions also explain why the historical focus of transitional justice was not on economic actors.<sup>344</sup> Furthermore, historical contexts in which the field emerges help to explain why socioeconomic concerns were left outside the bounds of transitional justice, as Arthur noted.<sup>345</sup> Given that initial transitions were conceived as short-term projects, economic concerns were seen as new tasks for successor regimes in the post-transition period.<sup>346</sup> On the other hand, mandates of both tribunals and truth commissions have traditionally relied heavily upon the realisation of human rights in the new transitional State, so they tend almost uniformly to emphasize CPRs rather than socioeconomic ones.<sup>347</sup> Consequently, socioeconomic concerns become doubly reduced in this translation; firstly, excluded by a focus on legalistic rights discourse and, secondly, left out according to the common preference of human rights mechanisms for CPRs violations.<sup>348</sup>

In 2006, Louise Arbour -then United Nations High Commissioner for Human Rights- delivered an influential public lecture in which she advocated for more attention to ‘economic and social justice for societies in transition.’<sup>349</sup> Arbour unequivocally called upon the importance of integrating ESCRs into ‘the transitional justice framework’<sup>350</sup> and highlighted how a range of transitional justice mechanisms have

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<sup>343</sup> Miller, Z., ‘Effects of invisibility: In search of the ‘economic’ in transitional justice’, *International Journal of Transitional Justice*, vol. 2, 2008, p. 275.

<sup>344</sup> Roth-Arriaza, N., ‘Why was the Economic Dimension Missing for So Long in Transitional Justice? An Exploratory Essay’, *op. cit.*, p.23.

<sup>345</sup> Arthur, P., ‘How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice”, *Human Rights Quarterly*, vol.31, 2009, p. 326

<sup>346</sup> Waldorf, L., ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’, *op.cit.*, p.173.

<sup>347</sup> Miller, Z., ‘Effects of invisibility: In search of the ‘economic’ in transitional justice’, *op.cit.*, p. 275.

<sup>348</sup> McEvoy, K., ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’, *Journal of Law and Society*, vol. 34, no. 4, 2007, p. 412.

<sup>349</sup> Before Arbour’s speech, some had already criticised TRCs for narrowly focusing on CPRs abuses. The earliest such critique came from South African NGOs that regretted the decision of the South African Truth and Reconciliation Commission to focus on politically motivated killings, torture and detention and its failure to engage with the widespread socioeconomic elements of *apartheid*. See University of the Western Cape’s Community Law Centre et al., ‘Submission to the Truth and Reconciliation Commission Concerning the Relevance of Economic, Social and Cultural Rights to the Commission’s Mandate, 18 March 1997,’ full document available at <http://www.justice.gov.za/trc/hrvtrans/submit/esc6> accessed 28 March 2018.

<sup>350</sup> Arbour, L., ‘Economic and Social Justice for Societies in Transition’, *op. cit.*, pp.3-7. ‘Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crises and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it. When making

dealt – and might deal – with these rights.<sup>351</sup> Additionally, Arbour argued that ‘violations of civil and political rights are intrinsically linked to violations of economic, social, and cultural rights.’<sup>352</sup> Several scholars and practitioners heeded that call.<sup>353</sup> Rama Mani, for instance, insisted that transitional justice ‘will lose credibility in the predominantly impoverished and devastated societies where it operates’ if it does not tackle social injustice, corruption, resource exploitation and criminal violence.<sup>354</sup> Similarly, The International Journal of Transitional Justice devoted a special issue to transitional justice and development in 2008, and the International Center for Transitional Justice published an edited collection on the same topic in 2009. Over the past few years, both scholars and practitioners have been promoting holistic approaches to the field of transitional justice, including potential links between ESCRs and development.<sup>355</sup> Furthermore, UN policy, scholarship and practice in the field of transitional justice have been also influenced by Arbour’s speech. For instance, in 2009 the Human Rights Council adopted a resolution that underlined the importance of ensuring that violations of all human rights, including economic, social and cultural rights, are addressed in transitional contexts.<sup>356</sup>

Lately, the complex debate about whether transitional justice should -and/or could- incorporate economic and social issues has substantially expanded, both in authors’ engagement and relevance.<sup>357</sup> Not all scholars and practitioners share positive

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that search, it is likely that one would expose a great number of violations of economic, social and cultural (ESC) rights and discriminatory practices’.

<sup>351</sup> *Ibid.* Additionally, in her speech, Arbour criticised United Nation Former Secretary General Kofi Annan for adopting a narrow formulation of justice in his important 2004 report on transitional justice.

<sup>352</sup> Arbour, L., ‘Economic and social justice for societies in transition’, *op.cit.*, p.4

<sup>353</sup> See for instance, Carranza, R., ‘Plunder and pain: Should transitional justice engage with corruption and economic crimes?’, *International Journal of Transitional Justice*, vol. 2, 2008, pp. 310–330; Gready, P., *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*, Routledge, 2010; Şahinkaya, Y., ‘The expanded scope of Transitional Justice: Addressing Root Causes of Economic, Social and Cultural Rights Violations’, *Human Rights Review*, no.1, vol. III, 2013.

<sup>354</sup> Mani, R., ‘Editorial: Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development’, *op. cit.*, pp. 253–265.

<sup>355</sup> See for instance de Greiff, P. and Duthie, R., ‘Transitional Justice and Development: Making Connections’, Social Science Research Council, 2009.

<sup>356</sup> ‘Human Rights Council Resolution on Transitional Justice and Human Rights,’ UN Doc. A/HRC/RES/12/11 (12 October 2009), para. 18 and preamble.

<sup>357</sup> For instance, transitions in the ‘Arab Spring’ countries have nurtured the discussions as to whether transitional justice efforts should address violations of ESCRs and other socioeconomic considerations. The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence,

arguments on the desirability of including socioeconomic concerns in the transitional process. Waldorf, for instance, argued that the ‘shift in transitional justice discourse and practice with respect to economic and social rights’ is deeply problematic,<sup>358</sup> as he conceives transitional justice as inherently short-term, legalistic and corrective, so he argues that it should focus on accountability for gross violations of civil and political rights. Indeed, he states that ‘transitional justice should avoid directly addressing past socio economic wrongs’.<sup>359</sup> On the other hand, some commentators have suggested that transitional justice as such needs to be rethought.<sup>360</sup> While transitional justice has historically focused on CPRs violations, they State the inclusion of ESCRs would require a paradigm shift within the field. Similarly, some have considered the term ‘transformative justice’ as an alternative to transitional justice, so that one could include socioeconomic issues in addressing the legacies of a violent or abusive past.<sup>361</sup> Lambourne, for instance, proposes a transformative model of transition which requires a transformation in social, economic and political structures and relationships.<sup>362</sup>

Concerning this last model proposal, Schmid and Nolan have usefully pointed out that when employing rights language, the current debate on the economic and social dimensions of transitional justice frequently suffers from terminological and conceptual confusion.<sup>363</sup> They argue that the distinction between ESCRs and broader

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Pablo de Greiff, pointed out that ‘a common feature of these recent transitions is the prominent role that claims relating to economic rights occupy in these transitions’. De Greiff, P., ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence,’ UN Doc. A/HRC/21/46 (9 August 2012), para. 17.

<sup>358</sup> Waldorf, L., ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’, *op. cit.*, p.171. It might be worth mentioning that this author used to work for Human Rights Watch, a human rights organisations which used to focus on CPRs.

<sup>359</sup> *Ibid.*

<sup>360</sup> See for instance, Haldemann, F. and Rachele Kouassi, ‘Transitional Justice without Economic, Social and Cultural Rights?’ in *Economic, Social, and Cultural Rights: Contemporary Issues and Challenges*,(eds) Riedel, E., Giacca, G., and Golay, C. , Oxford University Press, 2014, p.514; See also Oré Aguilar, G. and Gómez Isa, F. (Eds.), *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict*, Intersentia, 2011; See also

<sup>361</sup> See for instance, Gready, P. and Robins, S., ‘From Transitional to Transformative Justice: A New Agenda for Practice,’ *op. cit.*, pp. 339–361; See also chapter one, section five on transitional justice theories.

<sup>362</sup> Lambourne concludes that in addition to accountability or legal justice, attention needs to be paid to the psychosocial processes, socioeconomic conditions and political context in order for transitional justice to support peacebuilding. Lambourne, W., ‘Transformative justice and Peacebuilding’, in Buckley-Zistel, S., Koloma Beck, T., Braun, C., and Mieth, F. (Eds), *Transitional Justice Theories*, *op. cit.*, p.34.

<sup>363</sup> Schmid, E., and Nolan, A., ‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice’, *op. cit.*, p. 362.

socioeconomic issues often gets lost, so an accurate understanding of ESCRs and the obligations they impose is needed.<sup>364</sup> ESCRs are just one aspect of the socioeconomic dimension of transitional justice. According to them, these misconceptions about the legal framework led many commentators to conclude that inclusion of ESCRs needs to rethink transitional justice as a whole.<sup>365</sup> They rightly argue that transitional justice is not conceptualized uniformly, and the specific definitions accorded to transitional justice are not understood uniformly.<sup>366</sup> Thus, even within narrow and classic definitions of the field,<sup>367</sup> inclusion of ESCRs is perfectly conceivable, and addressing many violations of ESCRs can be relatively straightforward, particularly those related to States' negative obligations.<sup>368</sup> For instance, they argue that while determining the full scope of the State's maximum resources available may require a complex analysis, the scope of the obligation to gather disaggregated data on ESCRs enjoyment across society is much clearer. Additionally, there are some ESCRs rights which do not require significant resources, and therefore, they should be implemented immediately, such as the right to form and join trade unions and to collective bargain. Ultimately, Schmid and Nolan note that those who advocate for more attention to ESCRs in transitional justice should acknowledge the limitations of human rights law in bringing about rapid and sustainable social change.<sup>369</sup> This author agrees that it is unrealistic to expect that the inclusion of ESCRs will resolve the full extent of the socioeconomic challenges at stake in a post-conflict or post-authoritarian context, but that does not mean that they have no

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<sup>364</sup> *Ibid.* p.3. They summarized the ways that many authors have used ESCR language in four inaccurate dichotomies: discrete versus structural; short term versus long term; simple versus complex; violations/abuses versus background issues.

<sup>365</sup> *Ibid.* p.18.

<sup>366</sup> *Ibid.* p.19

<sup>367</sup> Such as the one made by Teitel in the following terms 'as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes'. Teitel, R., 'Transitional Justice Genealogy,' *op. cit.*, p.69. Furthermore, the UN secretary general defines transitional justices as 'the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses.', 'Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice', March 2010.

<sup>368</sup> Schmid, E., and Nolan, A., "Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice', *op. cit.*, p.378.

<sup>369</sup> About the ability of law to bring about social change, see for instance, Rosenberg, G.N., *The Hollow Hope: Can Courts Bring About Social Justice?*, University of Chicago Press, 2008. About the ability of the legalization and judicialization of ESCRs to bring about social change, see for instance, Gargarella, R., Domingo, P. and Roux, T. (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Ashgate, 2006.



contribution to make towards such broader goals.<sup>370</sup> Transitional justice will not be truly effective if violations of ESCRs continue to be omitted or limited to the background of conflict or repression.<sup>371</sup> However, while transitional justice should no longer ignore ESCRs violations, this author agrees that it cannot be assumed that transitional justice would solve by its own means the consequences of those violations. Rather, transitional justice strategies should be designed and implemented together with development programmes in transitional contexts, so they can work together in the area of socioeconomic rights to improve their enjoyment.<sup>372</sup>

Be that as it may, this new holistic and inclusive interpretation of transitional justice has been taken up by the United Nations<sup>373</sup> and the European Union<sup>374</sup> at institutional level. Although initiatives in this sense have not completely changed the traditional paradigm of transitional justice, they endorse greater emphasis on ESCRs violations in transition. Indeed, the Office of the UN High Commissioner produced in 2014 a report about how to better address ESCRs through the existing mechanisms in transitional justice processes.<sup>375</sup> Notably, this document called for more sustained and detailed research in the area of transitional justice, root causes of conflict and large-scale violations of ESCRs.<sup>376</sup> On the other hand, many truth commissions have begun to examine ESCRs and expanded their scope to broader socioeconomic issues, such as those of Sierra Leone<sup>377</sup> and Timor Leste.<sup>378</sup> Likewise, debates on prospective truth

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<sup>370</sup> Schmid, E., and Nolan, A., ‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice’, *op. cit.*, p.379.

<sup>371</sup> Cahill-Ripley, A., ‘Foregrounding socio-economic rights in transitional justice: realising justice for violations of economic and social rights’, *op. cit.*, p. 213.

<sup>372</sup> See for instance, De Greiff, P., ‘Articulating the Links between Transitional Justice and Development: Justice and Social Integration’, in De Greiff, P. and Duthie, R.(eds), *Transitional Justice and Development: Making connections*. New York, *op. cit.*, p. 63.

<sup>373</sup> United Nations, Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice, March 2010. Document available at [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf) accessed 2 April 2018.

<sup>374</sup> Council of the European Union, Secretary-General of the European Commission, Joint Staff Working Document: The EU’s Framework on support to transitional justice, Doc. SWD 158 final, 7 August 2015.

<sup>375</sup> OHCHR, ‘Transitional Justice and Economic, Social and Cultural Rights’, *op. cit.*

<sup>376</sup> *Ibid.* pp. 58–59.

<sup>377</sup> The truth commission in Sierra Leone named several socioeconomic abuses as ‘violations’ and formulated a range of recommendations relating to many of those identified violations. Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, vol. 2 (October 2004).

<sup>378</sup> The truth commission in Timor-Leste identified several violations of ESCRs and emphasized the need to examine them alongside the relevant legal instruments related to ESCRs and other human rights.

exercises to examine ESCRs issues are ongoing in some countries, such as in Argentina.<sup>379</sup>

## II.5 Addressing ESCRs in transitional justice processes

Arguments in favour of including violations of ESCRs in transitional justice processes support the idea that socioeconomic grievances are often an important element of conflict dynamics and part of the root causes of conflict. Similarly, properly addressing ESCRs could contribute to preventing the renewal of violence and human rights violations.<sup>380</sup>

An important clarification should be made at this point: it is not the same to investigate economic crimes and to address ESCRs violations, even if the two domains are closely related. ESCRs are entitlements of individuals or groups that create obligations for States -and in a limited way, to non-State actors-<sup>381</sup> so failure to comply with them primarily engages the State's international responsibility. On the other hand, economic crimes look at individual –or in some instances, corporations'-<sup>382</sup> criminal responsibility. However, States may be unable to comply with their international obligations when economic crimes affect the availability of State resources. Furthermore, State agents may be involved in economic crimes or turn a blind eye to them. Such behaviour could engage the international responsibility of the State if, as a result of such conduct, the State fails to comply with its human rights obligations. Ultimately, while both fields are interrelated, this thesis focuses on violations of

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Commission for Reception, Truth and Reconciliation Timor-Leste, *Chega!* (October 2005), parts 7 and 2, Annex A (esp. paras. 128–132).

<sup>379</sup> In 2015, the Congress adopted a resolution to set a Commission to examine aspects related to ESCRs, particularly economic crimes and corporate participation. However, as we more deeply analyse in our Chapter six, the commission has not been established to date.

<sup>380</sup> See for instance, Szoke-Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *op. cit.*, p. 471; See also

<sup>381</sup> See for instance Clapham, A., 'Human Rights Obligations for Non-State-Actors: Where are We Now?', *op. cit.* We further analyse this issue with regard to corporations in chapter three.

<sup>382</sup> *Ibid.*

ESCRs, without ignoring the importance of considering economic crimes alongside the examination of violations of ESCRs.<sup>383</sup>

Some traditional transitional justice mechanisms have been used when trying to address ESCRs. However, they have been often fairly limited in scope. The OHCHR highlighted the role of truth commissions, judicial and quasi-judicial proceedings, reparations and institutional reform when addressing ESCRs violations in transitional justice, in its latest report on the topic.<sup>384</sup> Waldorf also highlighted that the two mechanisms that have gone furthest in handling economic and social wrongs are truth commissions and reparations.<sup>385</sup> On the other hand, Sriram states that there are four domains in which economic harms<sup>386</sup> and transitional justice may and have been linked, although not to the same degree and in very different ways: through judicial measures, through Truth Commissions, through reparations, and through development programming.<sup>387</sup>

This section explores how ESCRs can be effectively addressed by mechanisms of the four main processes of transitional justice analysed in chapter one, namely Truth Commissions, judicial processes, reparations programs and institutional reform.

#### **II.4.A Truth Commissions**

Truth commissions have lately been considered as suitable instruments for addressing the root causes of conflict or repression and violations of ESCRs. Owing to their often limited mandates, most TRCs have focused on violations of CPRs, but they

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<sup>383</sup> See for instance, De Greiff, P., 'Articulating the Links between Transitional Justice and Development: Justice and Social Integration', in De Greiff, P. and Duthie, R.(eds), *Transitional Justice and Development: Making connections*. New York, *op. cit.*, p. 41.

<sup>384</sup> OHCHR Publication, 'Transitional Justice and Economic, Social and Cultural Rights', *op. cit.*, p. 16.

<sup>385</sup> Waldorf, L., 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', *op. cit.*, p.175.

<sup>386</sup> Sriram, in her own words, takes in her article 'a broad view of 'socioeconomic concerns' deliberately, so as to be able to draw upon several interwoven literatures dealing with the violation and protection of ESCRs, the economic dimensions of violent conflict, economic justice and redistribution, and development.' Lekha Sriram, C., 'Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?', *op. cit.*, p. 27

<sup>387</sup> Similarly, Sriram States that in some instances, responses to economic harms have taken place outside of official transitional justice processes, although in situations in which transitional justice processes either exist or might also have been contemplated. Lekha Sriram, C., 'Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?', *op. cit.*, p.40.

have given some attention to the root causes of conflict or repression and therefore, considered issues that affect the enjoyment of ESCRs, as has been usually reflected in their conclusions and recommendations.<sup>388</sup> However, they have generally failed to investigate fully the socioeconomic background to the conflict/repression under consideration, to elucidate the structural violence of the past or to fully grapple with the economic aspects of transition.<sup>389</sup>

Despite the fact that TRCs are seldom mandated to expressly address violations of ESCRs, they are frequently expected to address the socio-political context underlying the conflict or repression they examine. Indeed, some TRCs have already attempted to address ESCRs violations with different outcomes. Although their reports often analyse socioeconomic elements underpinning conflict, they are unable to mandate significant change. For instance, the South African Truth and Reconciliation Commission narrowly focused on ‘bodily integrity rights’ rather than on *apartheid* economic crimes and their impact on ESCRs as this was not in its mandate.<sup>390</sup> The social, economic and political system of *apartheid* was largely treated as context to instances of egregious bodily harm that became the TRC’s main focus. The TRC has been indeed strongly criticised for failing to see *apartheid* as the fundamental crime or to address the wide range of silent beneficiaries of it.<sup>391</sup>

Conversely, Timor Leste’s Commission for Reception, Truth and Reconciliation (known by its Portuguese acronym, CAVR) found that Indonesia’s ‘authoritarian style of government’ and its ‘close collaboration with special interests’ led it to breach its

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<sup>388</sup> Hayner, P., *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, Routledge, 2011, p. 77. See also the Final Report of South African Truth and Reconciliation Commission, vol.5, conclusions.

<sup>389</sup> Miller, Z., ‘Effects of invisibility: In search of the ‘economic’ in transitional justice’, *op. cit.*, p.276.

<sup>390</sup> As noted by Koska and others, within the scope of its mandate, the TRC in South Africa could have formally investigated allegations of labour violations. See Koska, G., ‘Corporate accountability in times of transition: the role of restorative justice in the South African Truth and Reconciliation Commission, Restorative Justice,’ *Restorative Justice*, vol. 4, no.1, 2016, p. 50. See also Spierer, H. and Spierer, L. ‘Accounting for human rights violations by non-State actors’, in Andreopoulos, G., Kabasakal, Z., and Juviler, P. (Eds.), *Non-State actors in the human rights universe*, Kumarian Press, 2006, pp. 48.

<sup>391</sup> See e.g., Mamdani, M., ‘Reconciliation without Justice’, *Southern African Review of Books*, vol. 46, 1996, pp. 25-27.

duty to fulfill ESRs.<sup>392</sup> Ultimately, however, it established that victims of these harms should not be considered to be beneficiaries for reparation, based on feasibility concerns and needs-based prioritisation.<sup>393</sup>

The report of the Sierra Leonean Commission also devoted a significant place to the underlying causes of conflict, highlighting corruption and poor governance and natural resources, among others.<sup>394</sup> To carry out its mandate, the Commission adopted categories of violations, including ‘economic violations’,<sup>395</sup> such as destruction of property, looting and extortion.<sup>396</sup> However, the TRC did not use relevant concepts such as minimum core obligations in its analysis of ESCRs. Very little was done likewise to implement its recommendations to address such violations.<sup>397</sup> Similarly, the Truth and Reconciliation Commission’s report in Liberia emphasized poverty, corruption and inequality as underlying causes of the conflict, but it did not provide any legal analysis of the violations of ESCRs.<sup>398</sup> Other truth commission reports such as from Guatemala and Peru addressed the socioeconomic factors behind the conflicts, including dispossession, inequality, exclusion, and even the colonial legacy. Nonetheless, socioeconomic factors were mostly relegated to the sections on historical background, where they could be more easily ignored.<sup>399</sup>

Some scholars have argued that TRCs should do more to remedy socioeconomic wrongs. Mani, for instance, contends that ‘truth commissions should go further than analysis of causes and should propose workable solutions for these (social)

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<sup>392</sup> *Chega!* The report of the Commission for reception, Truth, and Reconciliation in Timor-Leste. Executive summary, 2006. Document available at: <http://chegareport.net/Chega%20All%20Volumes.pdf> accessed 3 April 2018.

<sup>393</sup> *Ibid.* paras 40–41.

<sup>394</sup> Sierra Leone Truth and Reconciliation Commission, ‘Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission’, vol. 2. Report Three A, Chapters 1-4, 2004. Available at [http://www.sierraleonetr.com/index.php/view-the-final-report/download-table-of-contents/volume-three-a/item/witness-to-the-truth-volume-three-a-chapters-1-4?category\\_id=13](http://www.sierraleonetr.com/index.php/view-the-final-report/download-table-of-contents/volume-three-a/item/witness-to-the-truth-volume-three-a-chapters-1-4?category_id=13) accessed 3 April 2018.

<sup>395</sup> *Ibid.* vol. 3 A, chapter. 4, para. 14.

<sup>396</sup> *Ibid.* para. 19.

<sup>397</sup> McGonigle Leyh, B., ‘The Socialisation of Transitional Justice: expanding justice theories within the field’, *op. cit.*, p.93.

<sup>398</sup> Republic of Liberia Truth & reconciliation Commission, 2 consolidated final report, 2009, p.16-17. Document available at: <http://www.pul.org.lr/doc/trc-of-liberia-final-report-volume-ii.pdf> accessed 3 April 2018. See also Schmid, E., ‘Liberia’s Truth Commission Report: Economic, Social, and Cultural Rights in Transitional Justice’, *PRAXIS: The Fletcher Journal of Human Security* XXIV, 2009, p. 5–28.

<sup>399</sup> Waldorf, L., ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’, *op.cit.*, p.176.

injustices'.<sup>400</sup> Alternatively, Szoke-Burke proposes to include both CPRs and ESCRs sets within the mandate of a truth commission, or having a separate but related 'arm' of a commission charged with making recommendations regarding prevention of ESCRs violations.<sup>401</sup> However, TRC recommendations are often ignored, not because they are unworkable, but because those commissions are inherently weak institutions with short lifespans. While TRCs offer greater flexibility to collect information and to compose a fuller picture of violent past through inclusion and dialogue, there is the danger of overburdening the mandates, which usually operate with limited resources.

#### II.4.B Judicial Processes

There have been relatively few attempts at litigation on ESCRs violations *per se* in transitional justice strategies. Instead, most of the transitional processes have focused on abuses committed by States and non-State actors, which involve economic harm but not specifically ESCRs violations, and resulted in violations of certain CPRs.<sup>402</sup>

While both criminal and civil justice mechanisms face jurisdictional and other limitations, they can constitute a useful avenue to address violations of ESCRs, as well as the root causes of conflict or repression. Indeed, relevant jurisprudence related to ESCRs in transitional justice contexts can be found in the judgments of the Inter-American Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia, as is analysed below. It is worth noting likewise that the inclusion of ESCRs in State constitutions provides another means of litigation, namely through domestic constitutional claims.<sup>403</sup>

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<sup>400</sup> Mani, R., 'Editorial: Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development', *op. cit.*, p. 256.

<sup>401</sup> Szoke-Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *op. cit.*, p. 482.

<sup>402</sup> Lekha Sriram, C., 'Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?', *op. cit.*, p.40. In this sense, Sriram notes that a significant number of cases have been filed under the Alien Tort Claims Act (ATCA) in the United States. Some of those cases resulted in corporations facing civil charges, and in some cases, agreed to settlements for complicity in serious violations of human rights as part of their commercial activities in countries such as Colombia and Myanmar.

<sup>403</sup> Such as happened with the Colombian Constitutional Court, which has decided important cases on ESCRs in the context of the implementation of the Justice and Peace Law. For more information, see OHCHR Publication, 'Transitional Justice and Economic, Social and Cultural Rights', *op. cit.*, p. 29-31.

The IACtHR in *Ituango Massacres v. Colombia* is a representative example of how ESCRs have been litigated in regional courts. In that case, the petitioners alleged that the State had violated the prohibition of slavery and forced labour, given that some victims were coerced to herd livestock under threat of death.<sup>404</sup> The Court interpreted article 6 of the American Convention on Human Rights in the light of ILO Convention No. 29 concerning Forced or Compulsory Labour, ratified by Colombia in 1969. According to this interpretation, forced labour entails three elements: the menace of a penalty, involuntary labour and State participation or acquiescence. The Court held that all three elements were satisfied in this case and consequently found instances of forced labor<sup>405</sup> and violation of the right to property in relation to forcible displacements.<sup>406</sup>

Similarly, international criminal tribunals have successfully prosecuted conduct that violated ESCRs. In fact, The Rome Statute includes in its article 7 several underlying offences for crimes against humanity which may incorporate violations of ESCRs.<sup>407</sup> In the case *Prosecutor v. Brđanin*,<sup>408</sup> for instance, the International Criminal Tribunal for the former Yugoslavia held that ‘proper medical care was deliberately withheld from Bosnian Muslims and Bosnian Croats by the Bosnian Serb authorities for the very reason of their ethnicity.’<sup>409</sup> The cumulative effect of this conduct, together with the denial of other fundamental rights, such as the right to employment, freedom of movement and proper judicial process, amounted to persecution as a crime against humanity.<sup>410</sup> The *Krajišnik* case also illustrates the relevance of violations of ESCRs in

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<sup>404</sup> IACtHR, *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, (ser. C) No. 148 (July 1, 2006). The case relates to the execution of 19 inhabitants by paramilitaries (acting with the support of members of the military) in Aro and Granja, in Ituango. In addition to the executions, many people were forcibly displaced. Furthermore, in Aro, most houses were burned down and cattle and other livestock stolen. For several days, residents of the area were forced to herd cattle without remuneration. Army members imposed a curfew to facilitate the transfer of the stolen livestock without witnesses.

<sup>405</sup> *Ibid.* para. 168

<sup>406</sup> *Ibid.* para. 183

<sup>407</sup> Namely enslavement; deportation or forcible transfer of population; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health; and persecution.

<sup>408</sup> ICTY, *Prosecutor v. Radoslav Brđanin*, No. IT-99-36-T, Trial Chamber, Judgement of 1 September 2004.

<sup>409</sup> *Ibid.* para. 1076.

<sup>410</sup> *Ibid.*

the conflict of the former Yugoslavia.<sup>411</sup> The Chamber found that there had been unfair dismissal of people from public jobs, forced labour, lack of access on equal grounds to public services, inhumane living conditions in detention places, appropriation and plunder of property and destruction of private property.<sup>412</sup> Furthermore, the Special Court for Sierra Leone has also made findings on crimes against humanity involving infringement of ESCRs, particularly labour rights. Trial Chamber found in *Sesay, Kallon and Gbao* case,<sup>413</sup> that forced farming, mining and military training constituted the crime against humanity of enslavement.<sup>414</sup>

On the other hand, former State leaders have been also tried for corruption, such as Hosni Mubarak in Egypt or Alberto Fujimori in Peru, although these have not generally been articulated as violations of specific economic or social rights. Certainly, these sorts of prosecutions are frequently limited because those who benefited from economic plunder in conflict or under authoritarian rule remain politically powerful or they still are able to retain their spoils.<sup>415</sup> Therefore, while judicial processes can potentially be a useful tool to address and punish ESCRs violations, it might be difficult to prosecute perpetrators when they still maintain power and influence.

#### **II.4. C Reparations policies**

Reparations are the most victim-centred transitional justice mechanism, as they have the potential to respond more directly to victims' needs and priorities.<sup>416</sup> In fact, reparations are the field where transitional justice measures might be expected to directly deal with economic issues. However, they are primarily designed in most instances to respond to specific victims who suffered violations of CPRs, or to the needs

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<sup>411</sup> ICTY, *Prosecutor v. Momčilo Krajišnik*, No. IT-00-39-T, Trial Chamber, Judgement of 27 September 2006.

<sup>412</sup> *Ibid.* paras. 736, 755–756, 757–761, 765–772 and 773–779.

<sup>413</sup> SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, No. SCSL-04-15-T, Trial Chamber I, Judgement of 25 February 2009

<sup>414</sup> *Ibid.* paras. 1118–1121, 1215–1217, 1476–1477, 1588–1591, 1414–1443.

<sup>415</sup> Lekha Sriram, C., 'Liberal Peacebuilding and Transitional Justice: What Place for Socioeconomic Concerns?', *op. cit.*, p.41.

<sup>416</sup> UN, *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147. Document available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> accessed 27 March 2018.



of affected communities, rather than to address violations of specific economic rights or widespread inequality.<sup>417</sup>

The nature of reparations involves the transfer of money, goods or other services which can directly impact on victims' socioeconomic position.<sup>418</sup> Reparations are consequently, a very useful option for remedying victims of ESCRs violations.<sup>419</sup> As Miller states, 'reparations and compensation allow the State to redistribute wealth only in a strikingly narrow manner, frequently compensating only those named by the transitional justice measure'.<sup>420</sup> The effect leaves some of the structural causes of violence unaddressed, or at most to be the subject of development policy.<sup>421</sup> In fact, successor regimes frequently ignore, evade and delay implementing the reparations programmes recommended by truth commissions or other bodies.<sup>422</sup> Reparation programmes are inherently divisive, pitting individuals and groups against one another over who gets compensated and by how much. Such conflict can inhibit collective political action against the successor regime over economic policies.<sup>423</sup>

Despite the above mentioned, reparations awarded by the IACtHR have incorporated the realization of ESCRs in innovative ways. Particularly relevant in this sense is the *Plan de Sánchez Massacre v. Guatemala* case.<sup>424</sup> The Court considered that the massacre 'gravely affected the identity and values of the members of the Maya-Achí

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<sup>417</sup> Roht-Arriaza, N., 'Reparations and Economic, Social, and Cultural Rights', in Sharp, D. (ed.), *Justice and Economic Violence in Transition*, *op. cit.*, p.110.

<sup>418</sup> De Greiff, P., 'Articulating the Links between Transitional Justice and Development: Justice and Social Integration', in De Greiff, P. and Duthie, R., *Transitional Justice and Development: Making Connections*, *op. cit.*, p.37.

<sup>419</sup> Roht-Arriaza, N. and Orlovsky, K., 'A Complementary Relationship: Reparations and Development', in De Greiff, P. and Duthie, R., *Transitional Justice and Development: Making Connections*, *op. cit.*, p.170.

<sup>420</sup> Miller, Z., 'Effects of invisibility: In search of the 'economic' in transitional justice', *op. cit.*, p. 283-284.

<sup>421</sup> LaPlante, L., 'Transitional Justice and peacebuilding: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework', *International Journal of Transitional Justice*, vol. 2, no.3, 2008, p.334

<sup>422</sup> Tellingly, only 14 of the 84 transitions between 1970 and 2004 implemented reparations programmes. Olsen, T.D, Payne, L.A and Reiter, A.G, 'Transitional Justice in Balance: Comparing Processes, Weighing Efficacy', United States Institute of Peace Press, 2010, p.53.

<sup>423</sup> *Ibid.*

<sup>424</sup> IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Judgement of 19 November 2004, Series C, No. 116, in particular paras. 81, 100, 104–105, 107 and 110. The case concerns the massacre in 1982 of more than 268 indigenous people by the Guatemalan military and others. Guatemala recognized its international responsibility in the case.

people', thus recognizing the infringement of cultural rights and the damage caused to all things that made the livelihood of the community possible. The Court ordered both individual and collective reparations for pecuniary and non-pecuniary damage.<sup>425</sup> Additionally, the Court ordered the State to implement certain development programmes, intrinsically related to the enjoyment of ESCRs. With those decisions, the Court intended not only to restore the situation *ex ante*, but also to correct situations which it considered contrary to the spirit of international human rights law. The IACtHR has also in other relevant cases related to workers' rights such as *De La Cruz Flores v. Perú* case, which held that a doctor who was arbitrarily detained had to be reincorporated at the same level as he was before the detention took place.<sup>426</sup> Similarly, in the case *Loayza Tamayo v. Perú*, the Court ordered the victim's reincorporation to the teaching service and established that the salary and other benefits should be equivalent to the moment of her detention.<sup>427</sup>

It is also worth noting that reports of TRC often make recommendations to States on reparations on the basis of administrative reparation programmes. Some programmes include different forms of reparation that could have an impact on the realization of ESCRs, although it should be examined with caution due to implementation and financing problems. Argentina, as we further analyse in chapter six, developed such programmes.

Reparations have a limited scope, which means that trying to use them to solve deeper structural inequalities is fraught with difficulties, from the huge sums needed to the inability to adequately determine the beneficiary class.<sup>428</sup> On the other hand, attempting to provide reparations for too broad a category of violations will not only be prohibitively expensive but also risky regarding the expectations. Accordingly, reparations of ESCRs have been focused to date on cases of dispossession of land or

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<sup>425</sup> The Court awarded \$5,000 to each victim for pecuniary damage and \$20,000 to each victim, in part for the damage caused to their culture.

<sup>426</sup> IACtHR, *De La Cruz Flores v. Perú*. Merits, Reparations and Costs. Judgement of 18 November 2004, Serie C No. 115, paras. 169 y 171.

<sup>427</sup> IACtHR, *Loayza Tamayo v. Perú*. Reparations and Costs. Judgement of 27 November 1998, Serie C No. 42, paras. 113/114.

<sup>428</sup> For an account of the evolution of Peru's reparations program in light of these concerns, see Garcia-Godos, J., 'Victims Participation in the Peruvian Truth Commission and the Challenge of Historical Interpretation', *op. cit.*, p. 63-82.

other property, which led to denial of livelihood, education, health and other rights. Only recently have there been efforts to compensate or restitute lands taken for tactical or economic reasons within the context of armed conflict, but requiring proof that the dispossession was deliberately induced for political or discriminatory reasons.<sup>429</sup> There was, nevertheless, an initiative to establish a compensation programme for slave and forced laborers of the Nazi regime,<sup>430</sup> although many have claimed that reparations offered were insufficient.<sup>431</sup>

According to Roht-Arriaza, reparations intersect with ESCRs as the material reparations offered are both forward and backward looking, aimed at both redressing past harms and transforming lives for the future. While ESCRs are often concomitantly violated with the basic CPRs,<sup>432</sup> they have not received the attention from reparation programmes.<sup>433</sup>

#### **II.4. D Institutional reform**

According to the commentary on the updated principles to combat impunity ‘institutional reform should be of a ‘comprehensive’ nature for it to be ‘a foundation for sustainable justice.’<sup>434</sup> Consequently, institutional reform mechanisms should deal both

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<sup>429</sup> Duthie, R., 'Transitional Justice and Displacement', *International Journal of Transitional Justice*, vol.5, no.2, 2011, pp. 245-246. In the case of South Africa, for instance, the law required a causal link between the dispossession and racially discriminatory laws and practices.

<sup>430</sup> German Forced Labour Compensation Programme (GFLCP) Factsheet., available at <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/German-Forced-Labour-Compensation-Programme-GFLCP.pdf> accessed 6 April 2018.

<sup>431</sup> See for instance, Lynn Klinzing, M., 'Denying reparations for slave and forced laborers in World War II and the ensuing humanitarian rights implications: a case study of the ICJ's recent decision in jurisdictional immunities of the State', in *Georgia Journal of International and Comparative Law*, 41, 2013, p.775.

<sup>432</sup> For instance, family members of those killed or forcibly disappear suffer, not only the harm of losing a loved one, but also the loss of a breadwinner, the need to flee, the loss of schooling opportunities etc.

<sup>433</sup> In this sense it is worth mentioning that the jurisprudence of the Inter-American Court of Human Rights compensates survivors for these lost opportunities through the concept of changes in their 'life's project' (proyecto de vida). This was first introduced in the Loayza Tamayo case, (Loayza Tamayo case, Reparations, Judgement Inter-Am, Ct. H.R. (ser. C), No 42 (November 27, 1998)) and developed in subsequent cases. See generally Burgorgue-Larsen, L. and Úbeda de Torres, A., *The Inter-American Court of Human Rights: Case-Law and Commentary*, trans. Greenstein, R., Oxford University Press, 2011. pp. 229-230.

<sup>434</sup> Orentlicher, D., 'Report of the independent expert to updated Set of principles to combat impunity', (E/CN.4/2005/102), para. 66.

with structural transformations of those who participated in human rights violations and the root causes of conflict or repression in order to prevent further violations. Specifically with regard to ESCRs, institutional reform is a key dimension of transitional justice as it has the potential to trigger structural changes. However, it is at the same time, one of the most under-researched and unexplored areas.<sup>435</sup>

The Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal signed in November 2006 is a good example of including ESCRs through institutional reform mechanisms. The agreement explicitly calls for the establishment of a political system that fully complies with universally accepted human rights (sects. 3.4 and 7.1.2) and ends discrimination (sect. 3.5); and for the protection of the right to education, shelter, food security, social security, health and employment, as well as for land reform (sects. 3.9 and 7.5).<sup>436</sup> However, the development and implementation of those principles and goals has so far not been as satisfactory as expected.<sup>437</sup>

The transitional justice process in the post-*apartheid* regime in South Africa also required structural reforms in different areas, in which commitment to non-discrimination was essential. The institutional reform there began with the adoption of the Interim Constitution (Act 200 of 1993),<sup>438</sup> which contained a chapter on fundamental rights, including ESCRs. The Interim Constitution recognised the justiciability of all fundamental rights without any distinction.<sup>439</sup> Also, the Truth and Reconciliation Commission in South Africa dealt with institutional reform in different areas. While it did not consider specific violations of ESCRs, it emphasized that ‘the recognition and protection of socioeconomic rights are crucial to the development and

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<sup>435</sup> OHCHR Publication, ‘Transitional Justice and Economic, Social and Cultural Rights’, *op. cit.*, p.56.

<sup>436</sup> Full document available at [https://peacemaker.un.org/sites/peacemaker.un.org/files/NP\\_061122\\_Comprehensive%20Peace%20Agreement%20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/NP_061122_Comprehensive%20Peace%20Agreement%20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf) accessed 12 April 2018.

<sup>437</sup> See for instance, Pasipanodya, T., ‘A deeper justice: economic and social justice as transitional justice in Nepal’, *International Journal of Transitional Justice*, vol. 2, No. 3, 2008.

<sup>438</sup> Document available at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> accessed 12 April 2018.

<sup>439</sup> Constitutional Principles, number II, ‘Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution’

sustaining of a culture of respect of human rights'.<sup>440</sup> The Commission likewise recognised that businesses and financial institutions should help in the reconstruction by making resources available to those most in need.<sup>441</sup>

On the other hand, vetting procedures as part of institutional reform are a key tool that can be used to remedy and prevent human rights violations. Vetting is generally understood as the process of ensuring that public officials responsible for gross human rights violations do not continue to serve in State employment.<sup>442</sup> As Szoke-Burke notes, where breaches of ESCRs were linked to the past conflict, vetting those who are guilty of ESCRs violations, including non-State actors, can be an effective means of ensuring non-recurrence and of strengthening the rule of law.<sup>443</sup>

The above-mentioned examples and experiences reveal some ways in which different institutional reform measures can be used to address ESCRs within the transitional justice process. However, it is important to be aware that institutional reform is a lengthy process, so results might be perceived only in the mid and long term. They will certainly depend on political will and the existence of adequate resources to carry them out.

## **II.6 Intermediate conclusions**

This second chapter explored the general contents and scope of State obligations imposed by ESCRs, particularly with regard to their potential inclusion in transitional justice processes. Labour rights were taken as reference to do this analysis, and specifically, the right to form and join trade unions and the right to collective bargain. It was contended thus that it seems to be undeniable that certain labour rights, such as those indicated above, are compelling, universal and timeless entitlements. Indeed, violations of such rights can also have a negative impact on the full set of rights, for instance, the right to an adequate standard of living, or even lead to other serious

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<sup>440</sup> South African Truth and Reconciliation Commission Report, vol. 5, chap. 8, p. 308. Document available at <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf> accessed 12 April 2018.

<sup>441</sup> *Ibid.* pp. 318–320.

<sup>442</sup> Orentlicher, D., 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', *op. cit.*, principle 36.a

<sup>443</sup> Szoke-Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *op. cit.* p. 489.

violations such as the prohibition of forced and slave labour. Similarly, it was noted that accountability mechanisms have been progressively improved, particularly at the regional level, in order to respond to violations of ESCRs.

This chapter also contended that inclusion of ESCRs in transitional justice processes is still highly disputed within transitional justice scholarship. Although transitional justice has been traditionally focused on bodily integrity violations, recent claims and debates open the door to include socioeconomic conditions and violations of ESCRs within the existing transitional justice mechanisms. It has been argued that some misconceptions and conceptual confusion occurred when trying to address this issue. In this sense, it should be noted that ESCRs are just one element of the socioeconomic dimension of transitional justice. While it would be unrealistic to expect that addressing those rights will resolve the full extent of the socioeconomic challenges at stake in post-conflict or post-authoritarian situations, transitional justice processes should no longer ignore ESCRs violations. Addressing certain and specific ESCRs violations according to their particular context and past violent dynamics, could definitely contribute to improving socioeconomic concerns in this regard. Additionally, this chapter illustrated how this task can be effectively done with the existing transitional justice mechanisms. The employment of specific mechanism or a combination of them will ultimately depend on the rights violated in each case and the context in which the transitional justice process itself is taking place.

## **SECTION 2 – CORPORATE ACCOUNTABILITY IN TRANSITIONAL JUSTICE**

### **III. CHAPTER THREE – Corporate accountability for human rights abuses**

#### **III.1 Introduction**

The era of globalization has deeply changed the dynamics of the world we live in. Economic actors, particularly corporations and multinational companies, have gained unprecedented power and influence, and they consequently have a remarkable impact on people's living conditions and communities in which they operate. The private sector may thereby contribute to global prosperity through the economic development of societies,<sup>444</sup> but it can also produce a negative impact on virtually the entire spectrum of internationally recognised human rights.<sup>445</sup> Moreover, corporations often conduct operations in countries affected by armed conflict and widespread violence, or those under repression. In fact, some remarkable examples of these negative corporate impacts have appeared in unstable and violence-ridden zones, as was the situation for the infamous *Shell Company* case in Nigeria and *Chiquita Brand* case in Colombia.<sup>446</sup>

After the Second World War, the US Military Tribunals tried several German industrialists for complicity with the Nazi regime.<sup>447</sup> While in these Nuremberg trials the defendants were the corporate managers and not the company itself, they constitute

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<sup>444</sup> Schutter, O et al, 'Foreign Direct Investment, Human Development and Human Rights: Framing the issues', *Human Rights & International Legal Discourse*, no. 137, 2009, p. 159.

<sup>445</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', John Ruggie, A/HRC/17/31, 21 March 2011, endorsed in Res. 17/4 adopted by the Human Rights Council, A/HRC/RES/17/4, (2011). Principle 12, Commentary Full document available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) accessed 15 April 2018.

<sup>446</sup> Mares, R., 'Corporate and State responsibilities in conflict affected areas', *op. cit.*, p.294

<sup>447</sup> *United States of America v Carl Krauch et al.* ('I.G. Farben Case'), 1948.; *United States of America v Friedrich Flick et al.* ('The Flick Case'), 1948; *United States of America v Alfred Krupp et al.* ('The Krupp Case'), 1947.

the historical origins of considering the actions of a company as an accomplice for human rights abuses. These cases established that there can be legal consequences for cooperation between economic actors and repressive governments, including prosecution for international crimes.<sup>448</sup> However, the debate is still today open on whether to penalise the corporate actor as entity or individuals in charge -such as the managers and executive directors, as happened in the Nuremberg Trials. While individuals may be prosecuted and removed from a corporation, the corporate entity continues to exist and might continue its misconduct. Prosecuting an individual may not deter the behavior of the corporation as a whole. Conversely, prosecuting a corporation may not deter an individual's criminal conduct. Thus, although a parallel approach to this issue is necessary, this author agrees with Ramasastry that penalising the company itself may provide a greater deterrent for corporations than the isolated prosecutions of individuals.<sup>449</sup>

Despite corporations' significant role in the international sphere, there are several difficulties in establishing a general regulatory framework for companies' activities and their impact on human rights.<sup>450</sup> An important debate has lately been generated about whether non-State actors, and particularly, corporations, have human rights obligations.<sup>451</sup> From the traditional perspective, States are the primary subjects of international public law and therefore, the consideration of companies as subjects of obligations and responsibilities in this field is not exempt from criticism.<sup>452</sup> Regarding

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<sup>448</sup> Ramasastry, A., 'Corporate Complicity: From Nuremberg to Rangoon –An examination of force labor cases and their impact on the liability of Multinational Corporations', *Berkeley Journal of International Law*, vol. 20, issue I, 2004, p.98-99.

<sup>449</sup> *Ibid.* p.96

<sup>450</sup> Traditionally, companies tended to approach human rights and social issues through their corporate social responsibility (CSR) programmes. CSR is focused on corporate voluntarism and expectations of corporations as social actors, so many of these initiatives are undertaken selectively, based on what the company voluntarily chooses to address. But that proved to be inadequate and insufficient to prevent and mitigate corporate-related human rights abuses. Much more was needed: a real human rights approach that requires companies to respect all human rights.

<sup>451</sup> In fact, as corporations are not primary subjects of Public International Law, the proper terminology that should be used is 'corporate-related human rights violations'. See for instance Augenstein, D., 'Access to Justice in the European Union for Corporate-Related Human Rights Violations: Jurisdictional Issues', *Tilburg Law School Research Paper*, no. 7, 2017.

<sup>452</sup> For instance, Ford argues that 'it cannot be said that international human rights law involves direct legal duties for businesses', Ford J., *Regulating Business for Peace*. Cambridge University Press, 2015, p.37. On the other hand, Karavias, M., *Corporate obligations under International Law*, Oxford University Press, 2013. Clapham held that ultimate contemporary opposition to an extension of human rights law into the non-State actors remains fuelled by two factors. Firstly, he argues, because of the fear



corporations specifically, some commentators argue that they do have international human rights obligations.<sup>453</sup> Clapham, for instance, argues that the scope of corporate obligations depends on its capacity, context and commitments.<sup>454</sup> To reinforce these arguments, Clapham points out several recent developments. The first one refers to the adoption in 2014 by the African Union of a new treaty that adds a criminal chamber to the African Court of Justice and Human Rights, stipulating that corporations can be prosecuted for certain international crimes in this new Chamber.<sup>455</sup> The second one focuses on the Special Tribunal for Lebanon. On October 2, 2014, the Appeals Panel determined that a corporation could be prosecuted for contempt before this international criminal court. The Appeals Panel drew two interesting conclusions, the first in relation to human rights law and the second in relation to criminal law. Clapham notes that the Panel concluded that ‘the current international standards on human rights allow for interpreting the term’ person ‘to include legal entities (...).’<sup>456</sup> The evolution at the national level as well as the treaties that refer to the criminal liability of companies, make him conclude that ‘corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.’<sup>457</sup>

Business and human rights as a field began to be institutionalised on the multilateral agenda in the mid-2000s. Notably, the appointment of Professor John Ruggie as the UN Secretary-General’s Special Representative on the issue of business

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that human rights law will lose its specificity if extended to the acts of others than States; and secondly, because the concern that legal developments could lead to new forms of liability for corporations which would leave them vulnerable to lawsuits beyond the control of their home States. He also concludes by stating that those who resist the extension of human rights obligations at least agree that corporations have human rights responsibilities, understanding a ‘responsibility’ to be something less than a legal obligation. Clapham, A., ‘Human Rights Obligations for Non-State-Actors: Where are we now?’ *op. cit.*, pp.2 and 19.

<sup>453</sup> See for instance, Clapham, A., *Human Rights Obligations of Non State Actors*, Oxford University Press, 2006, p. 58; See also Clapham, A., ‘Non-State Actors’, in Moeckli, D., Shah, S. and Sivakumaran, S., with Harris, D. (Eds), *International Human Rights Law*, Oxford University Press, 2017, pp. 531-550; See also Jägers, N., ‘Corporate Human Rights Obligations: In search of accountability’, Intersentia, 2002; Toebe, B., and Letnar Černič, J., ‘Corporate Human Rights Obligations under Economic, Social and Cultural Rights’, in Addicott, J.F., Hossain Bhuiyan, M.J., and M.R. Chowdhury, T., *Globalization, International Law, and Human Rights*, Oxford University Press, 2012.

<sup>454</sup> Clapham, A., ‘Human Rights Obligations for Non-State-Actors: Where are we now?’ *op. cit.*, p. 12. Clapham also states in this sense that this idea has not been so far authoritatively rejected by the United States Supreme Court within the framework of the ATS, where most cases of corporate human rights abuses have been brought.

<sup>455</sup> STC/Legal/Min/7 (I) Rev. 1, 15 May 2014.

<sup>456</sup> Clapham, ‘Human Rights Obligations for Non-State-Actors: Where are we now?’, *op. cit.*, p.15

<sup>457</sup> *Ibid.*

and human rights contributed to this end. Since then, business and human rights concerns have witnessed an exponential growth in international debates in recent years, fostered in great measure by the political and institutional process of drafting and adopting the United Nations Guiding Principles on Business and Human Rights ('Guiding Principles' or UNGPs).<sup>458</sup> However, some have criticised the approach followed by Ruggie, arguing that it focuses more narrowly on holding corporations accountable for harm caused rather than on a positive recognition of the role business might play in protecting and promoting human rights.<sup>459</sup>

This chapter seeks to examine and assess the notion of corporate accountability for human rights abuses. Given that corporations are not primary subjects of Public International Law, their involvement in such abuses has been often categorised as complicity.<sup>460</sup> Accordingly, section two explores the policy meaning and legal implications of corporate complicity in human rights abuses, as well as the different categories that can be distinguished within the concept. Ultimately, this chapter provides a general assessment of what options offer the existing legal regimes for corporate accountability in human rights abuses, namely domestic and international criminal law, civil law of remedies and IHRL. For the purpose of this thesis, the term 'accountability' refers to the general obligation to 'answer', implying the condition of being responsible for certain actions.<sup>461</sup> Similarly, 'responsibility' is used throughout this chapter according to the meaning given to it in Public international law. While the term has recently been used in the framework of business and human rights standing for

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<sup>458</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework'*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', Ruggie, J., A/HRC/17/31, 21 March 2011, endorsed in Res. 17/4 adopted by the Human Rights Council, A/HRC/RES/17/4, (2011)

<sup>459</sup> See for instance, Bilchitz, D., 'The Ruggie Framework: an adequate rubric for corporate human rights obligations?', *South-African Institute for Advanced Constitutional, Public, Human Rights and International Law*, University of Johannesburg', 2009, p.5.

<sup>460</sup> Indeed, the concept of corporate complicity in human rights abuses has received much consideration by courts in the United States of America under the ATS, as analysed in section II and III of this chapter.

<sup>461</sup> See for instance, Nollkaemper, P.A., and Curtin, D., 'Conceptualizing Accountability in International and European Law', *Netherlands Yearbook of International Law*, vol. 36, no.1, 2005, pp. 3-20; Kool., R.S.B., '(Crime) Victims' Compensation: The Emergence of Convergence', *Utrecht Law Review*, vol. 10, no. 3, 2014, pp. 14-26. However, as Brunée notes, 'notwithstanding its increasingly frequent invocation by international lawyers, the concept of "accountability" has not acquired a clearly defined legal meaning'. Brunnee, J., 'International legal accountability through the lens of the laws of State responsibility', *Netherlands Yearbook of International Law*, vol. 36, no.1, 2005, p.22.

stronger effect,<sup>462</sup> this work understands ‘responsibility’ as for a wrongful conduct, according to international law on responsibility. Consequently, responsibility refers to secondary norms through which corporations can be held accountable for breaches of the primary norms.<sup>463</sup> Likewise, the term ‘liability’ is used to refer to cases in which accountability for human rights abuses can be demanded by legal means, and therefore, litigated at the corresponding courts.<sup>464</sup>

While the business and human rights agenda is mainly focused on Multinational or Transnational Companies (MNCs or TNCs) as they operate across national borders, this chapter analyses corporate accountability from a general conception of business enterprises, meaning that, irrespectively from their size or whether they operate at the national or transnational level, or are State or privately owned.<sup>465</sup>

### **III.2 Clarifying the notion of corporate complicity for human rights abuses**

#### **III.2.A Policy meaning and legal implications**

When legally defining corporate accountability, some questions arise regarding the role and responsibility of corporations in human rights abuses, such as, what sort of corporate behaviour could trigger corporate accountability for human rights abuses? Could a company be considered legally accountable when operating in a conflict-affected or under-repression country where human rights violations are taking place? What conditions need to be fulfilled to consider that a corporation operating in those contexts is being complicit in human rights abuses? In order to provide answers to those questions, this section examines the notion and the scope of corporate complicity for human rights abuses.

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<sup>462</sup> Particularly in the UNGPs.

<sup>463</sup> By contrast, the term ‘obligation’ refers to the primary norms by which actors are legally bound.

<sup>464</sup> This term will be mainly used at section 3 of this chapter, regarding domestic criminal law and civil law of remedies regimes.

<sup>465</sup> According to the general definition, a corporation is a legal entity characterized by legal personality, transferable shares, limited liability, centralized management and investor ownership. See for instance, Armour, J., Hansmann, H., Kraakman, R., ‘The essential elements of corporate law: what is corporate law?’ *Harvard, JM., Olin Center for Law, Economics and Business*, Discussion Paper No. 643, 2009.

Complicity is a particular way of contributing to wrongdoing which requires that responsibility be attributed to accomplices for their acts of complicity.<sup>466</sup> While the concept of complicity has traditionally had a specific and technical meaning in criminal law -closely linked to the notion of ‘aiding and abetting’-, it is nowadays being used in a much richer and broader fashion in the field of business and human rights. In 2008, the International Commission of Jurists established the Expert Legal Panel on Corporate Complicity in International Crimes. The panel’s mandate was to reflect on the situations in which companies and/or their executives could be held legally responsible under criminal and/or civil law when they are ‘complicit’ with governments, armed groups, or other actors in gross human rights abuses.<sup>467</sup> The panel addressed the legal and policy meaning of complicity as an essential part of the report. According to the report, the word *complicity* has been frequently used on a daily basis referring to one actor that becomes involved in an undesirable manner in something that someone else is doing, but not strictly in the legal sense of the word. In the field of human rights, such use of the concept has provided a tool to capture in simple terms the fact that companies can become involved in human rights abuses in a way that raises legal responsibility. The report also noted that human rights organisations and activists, international policymakers, government experts and businesses themselves, now continuously use the phrase ‘business complicity in human rights abuses’ to describe what they view as undesirable business involvement in such abuses.<sup>468</sup> The panel concluded in this sense that whereas the use of the terms is widespread, there continues to be considerable confusion and uncertainty about the boundaries of this concept and in particular when legal liability, both civil and criminal, could arise for such complicity.<sup>469</sup>

Similarly, the former Special Representative of the Secretary General on Business and Human Rights, John Ruggie, tried to clarify the concept of complicity in 2008.<sup>470</sup> Ruggie noted that the term ‘complicity’ in the business and human rights

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<sup>466</sup> Jackson, M., *Complicity in International Law*, Oxford University Press, 2015, p.1

<sup>467</sup> Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, ‘Corporate Complicity & Legal Accountability’, Volume I, 2008, p.1

<sup>468</sup> *Ibid.* p.2

<sup>469</sup> *Ibid.*

<sup>470</sup> The former Special Representative, John Ruggie, devoted a full report to the clarification of the concept of ‘Sphere of Influence’ and ‘Corporate Complicity’. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Clarifying the Concepts of ‘Sphere of Influence’ and ‘Complicity’*, A/HRC/8/16 (2008)

context refers to the indirect involvement of companies in human rights abuses.<sup>471</sup> Likewise, Ruggie argued that complicity may be alleged in relation to knowingly contributing to any type of human rights abuse, whether of CPRs, or ESCRs. Regarding the legal consequences, Ruggie affirmed ‘it is not possible to specify exacting tests for what constitutes complicity even within the legal sphere’, noting that ‘the clearest guidance comes from international criminal law and the cases on aiding and abetting’.<sup>472</sup> Ultimately, the report concludes that while ‘operating in contexts where abuses occur and the appearance of benefiting from such abuses’ is ‘unlikely, by itself, to lead to legal liability’, it ‘should serve as red flags for companies to ensure that they exercise due diligence, adapted for the specific context of their operations’.<sup>473</sup>

Human rights violations can take place in different contexts but, certainly, the risks are particularly significant in areas of poor governance, conflict-affected zones or under oppressive regimes. Indeed, companies operating in these kinds of environments are at particular risk of being complicit in human rights abuses committed by other actors.<sup>474</sup> While corporations have been occasionally accused of being primary perpetrators of human rights violations, to date, most of the cases that have been prosecuted or litigated concern allegations of ‘corporate complicity’ in gross human rights abuses perpetrated by others -generally governments and State authorities or armed groups.<sup>475</sup> Human rights abuses often have an economic dimension and they are frequently driven by financial interest, closely linked to the private sector sphere. Companies have typically been involved in different ways in these human rights violations, but only a few cases have threatened businesses with legal risks or reputational damage for doing business with dictators or warlords.<sup>476</sup> Conditions in those areas make it difficult for victims of corporate wrongdoings to seek justice and hold businesses accountable. Commonly this happens not only because of the weakness in the justice system, but also due to the fact that authorities may be unwilling to do so

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<sup>471</sup> *Ibid.* p.9

<sup>472</sup> *Ibid.* p.10

<sup>473</sup> *Ibid.* p. 21

<sup>474</sup> UN Guiding Principles. Guiding Principle 23, Commentary.

<sup>475</sup> Zerk, J., ‘Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies’, Report prepared for the Office of the UN High Commissioner for Human Rights, 2013 p. 24.

<sup>476</sup> Payne, L. and Pereira, G., ‘Corporate Complicity in Dictatorships’, *Oxford University Working papers*, 2014, p.1.

because of their own involvement in human rights violations, or because they profit from business activities and seek to create a conducive environment that attracts businesses. According to Kaleck and Saage-Maasz, cases in which corporations cooperate in varying degrees with military regimes and dictatorships can be classified into three sub-categories: (a) cases in which corporations profit from State violence, (b) cases in which the regime's human rights abuses are facilitated by providing the necessary means and (c) cases in which corporations directly support repression without direct economic benefit. The accountability mechanisms could vary slightly, depending on the kind of cooperation the corporation provided to the State.<sup>477</sup>

It is probably unsurprising that the greatest difficulty in those contexts is to define the blurred lines of legal accountability. In other words, how close the company actions have to be to the violations to be held legally responsible. There are many studies and debates in legal scholarship around this issue due to the need for legal interpretation in the absence of settled international law.<sup>478</sup> In this sense, the ICJ Panel suggests what can be called a negative approach; that means the kind of conduct the company should avoid in order to not cross the threshold of legal risk.<sup>479</sup> According to their report, there are mainly three elements that can guide the inquiry:

1. Causation/Contribution: taking into account whether the company's conduct enables, exacerbates or facilitates the human rights abuses.
2. Knowledge & Foreseeability: considering the intentionality component.
3. Proximity: measuring how close the company was to the principal perpetrator.

Theories of corporate complicity assume a key role in domestic legal responses to corporate involvement in human rights abuses and the categorization of corporate complicity. However, there are also many differences between different jurisdictions

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<sup>477</sup> Kaleck, W., and Saage-Maasz, M., 'Corporate accountability for Human Rights Violations amounting to International Crimes', *Journal of International Criminal Justice*, vol. 8, 2010, p.703.

<sup>478</sup> See for instance, Payne, L. and Pereira, G., 'Corporate Complicity in International Human Rights Violations', *Annual Review of Law and Social Science*, vol. 12, no.20, 2016, pp. 1-22. See also, Olson, D., 'Corporate complicity in Human Rights violations under international criminal law', *International Human Rights Law Journal*, vol. I, Article 5.

<sup>479</sup> The Panel only takes into account two legal regimes: ICL and Tort Law, as it considers them as the only ones which offer some avenues towards ensuring the legal accountability of companies when they are complicit in gross human rights abuses. The report was released in 2008, three years before the adoption and endorsement of the UNGPs.

regarding the elements of liability and the extent to which the knowledge and intentions of individuals can be attributed to the corporation itself, as further analysed in section 3.<sup>480</sup>

### **III.2.B Categories of corporate complicity**

In 1999, the former Secretary General of the United Nations, Kofi Annan, had already proposed for the first time the Global Compact.<sup>481</sup> He then urged companies to support and respect the protection of human rights within their sphere of influence and the duty to ensure they are not accomplices in the violation of human rights.<sup>482</sup> Similarly, Margaret Jungk rightly describes the spectrum of activities that have been linked to the notion of corporate complicity in human rights abuses in her Practical Guide to Address Rights Concerns of Companies Operating Abroad:

“Regrettably, multinational are sometimes guilty of complicity in human rights violations perpetrated by governments. There are many cases where businesses have, for example, promoted the forcible transfer of populations from land which they required for business operations. At other times, by simply “doing business” with the national government, companies have unintentionally aggravated human rights disputed?, for example, in cases where minority group have claimed autonomy over an area. Even where a company’s operations do not directly impact upon human rights issues, the company may nonetheless be called upon to speak out or act when an oppressive government violates its citizen’s rights”.<sup>483</sup>

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<sup>480</sup> This is mainly identified with company managers and executive directors.

<sup>481</sup> The Global Compact is a voluntary initiative calling to companies to align their strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals. More information about this initiative in <https://www.unglobalcompact.org/> accessed 13 April 2018.

<sup>482</sup> Annan’s speech at World Economic Forum in Davos, Switzerland, on 31 January 1999. A press release with his words can be found at <https://www.un.org/press/en/1999/19990201.sgsm6881.html> accessed 13 April 2018.

<sup>483</sup> Jungk, M., ‘Practical guide to addressing human rights concerns for companies operating abroad’, in. Addo, M. (Ed), *Human Rights Standards and the Responsibility of Transnational Corporations*, Kluwer Law International, 1999, p. 171.

The notion of corporate complicity, thus, aims to ascribe a certain level of accountability to corporations but without removing State obligations and responsibility for human rights violations.<sup>484</sup> Based on these insights, a number of scholars agree that corporate complicity can be divided into three categories: direct, indirect and silent complicity.<sup>485</sup> However, it should be highlighted once more that the notion of corporate complicity for human rights abuses has not been yet legally defined at international level, or uniformly at domestic level, so the categorisation presented below is mainly based on academic works.

### **III.2. B. a Direct Corporate Complicity**

Clapham and Jerbi argue that much of the literature on business and the human rights field avoids setting up clear limits for categories of corporate complicity. However, they continue, a review of international criminal law suggests that complicity requires intentional participation, but not necessarily the intention to harm, only knowledge of foreseeable harmful effects.<sup>486</sup> On the basis of International Tribunals case law,<sup>487</sup> they note that a company that knowingly assists another actor in violating customary international law may be considered directly complicit in such violation.<sup>488</sup> Therefore, cases which involve corporate direct complicity derive from a corporation's direct and causal contribution to the specific human rights abuse. It is not required, thus, to have the desire or share the criminal results, but to know the 'probable effects of their assistance'.<sup>489</sup> Consequently, a corporation may be considered a direct accomplice to

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<sup>484</sup> Clapham, A., 'Corporations and Criminal Complicity', in Nystuen, G., Follesdal, A. and Mestad, O. (eds), *Human Rights, Corporate Complicity and Disinvestment*, Cambridge University Press, 2010, pp. 225-228.

<sup>485</sup> See for instance, Clapham, A., and Jerbi, S., 'Categories of corporate complicity in human rights abuses', *Hastings International & Comparative Law Review*, 2001, pp. 339-349; Ramasastry, A. 'Corporate Complicity: From Nuremberg to Rangoon –An examination of force labor cases and their impact on the liability of Multinational Corporations', *Berkeley Journal of International Law*, Volume 20, Issue I, 2002, pp.91-159; or Wettstein, F., 'The duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights advocacy', *Journal of Business Ethics*, vol. 96, 2010, pp.33-47. Wettstein distinguishes four categories as he draws 'beneficial complicity' and 'silent complicity' from the broad category of indirect complicity.

<sup>486</sup> Clapham, A., and Jerbi, S., 'Categories of corporate complicity in human rights abuses', *Hastings International & Comparative Law Review*, 2001, pp. 341-342

<sup>487</sup> Such as the Rwanda and the Former Yugoslavia Tribunals.

<sup>488</sup> *Ibid.* p.342

<sup>489</sup> *Ibid.* p.345



abuses committed against human rights when it decides to participate or to assist in the commission thereof and whenever such assistance contributes to the abuse itself. However, defining what elements constitute participation is still quite controversial.<sup>490</sup>

Ultimately, direct corporate complicity implies that the corporation is not merely facilitating the actions of the primary perpetrator, but directly contributing to the abuses itself. Practical examples of this category can be found in German and Japanese corporations which recruited and subjected workers to forced labor during the Second World War. In many cases, these companies knew the consequences of their actions.<sup>491</sup> Likewise, corporations that made available their facilities to the armed forces for the interrogation and torture of unionists or protesters fall into the category of direct accomplices.<sup>492</sup> As we will further analyse within the framework of our case study in chapters four and five, many corporations in Argentina acted in that way.

### **III.2. B. b Indirect Complicity**

Also known as ‘beneficial’ complicity’,<sup>493</sup> the company is not itself the direct perpetrator of the abuse within this category, but it benefits from human rights abuses committed by the main perpetrator.

According to Clapham and Jerbi, the labels of ‘indirect’ or ‘beneficial’ complicity are likely to be applied where companies knowingly benefit from human rights abuses. Therefore, what is relevant is that in contexts in which human rights are clearly violated, it is not necessary that the company itself causes the damage or the violation to be affected by it. The company assumed, consequently, that this would be the risk if operating in such contexts.<sup>494</sup>

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<sup>490</sup> Ramasastry, A., ‘Corporate Complicity: From Nuremberg to Rangoon –An examination of force labor cases and their impact on the liability of Multinational Corporations’, *op. cit.*, p.102.

<sup>491</sup> *Ibid.*

<sup>492</sup> Wettstein, F., ‘The duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights advocacy’, *op. cit.*, p. 36.

<sup>493</sup> Although Wettstein, as mentioned early in this chapter, divides indirect complicity into two sub-categories: beneficial complicity and, silent complicity.

<sup>494</sup> Clapham, A. and Jerbi, S., ‘Categories of corporate complicity in human rights abuses’, *op. cit.*, p.347.

The spectrum of behaviors that could constitute indirect complicity is very broad. As pointed out by Ramasastry, a company can provide assistance to a repressive regime in the form of income earned as part of a joint venture. On the other hand, the corporation may also know that the host government is involved in human rights violations but the links between its investment and human rights violations are not so clearly delimited. Relevant factors for the determination of complicity can include the time or duration of the investment and the association, the type of financing, and the nature of the business relationship.<sup>495</sup> Ramasastry suggests in this regard that the courts must balance the factors to determine whether beneficiary complicity has reached such a threshold that a corporation's continued presence and investment amounts to participation in a criminal enterprise.<sup>496</sup> This category includes cases in which companies that hold contractual partnerships or joint ventures with host governments benefit from human rights violations committed by them. In this sense, the UNOCAL case seem to be an example of indirect complicity due to the company relationship with the government of Myanmar and the use of repressive measures by security forces to guard the facilities of the multinational.<sup>497</sup>

### **III.2. B. c Silent Complicity**

This category reflects the idea that the mere presence or participation in the economic activity of the host country turns the companies into part of the abuses committed there.<sup>498</sup> In other words, being silent in front of human rights abuses can imply a form of complicity.

Clapham and Jerbi refer to the approach of Sir Geoffrey Chandler (Chair of the Amnesty International Business Group in UK), who has Stated that 'Silence or inaction will be seen to provide comfort to oppression and may be adjudged complicity (...)

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<sup>495</sup> Ramasastry, A., 'Corporate Complicity: From Nuremberg to Rangoon –An examination of forced labor cases and their impact on the liability of Multinational Corporations', *op. cit.*, p.102.

<sup>496</sup> *Ibid.* p.103.

<sup>497</sup> See for instance, Chambers, R., 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses', *Human Rights Brief*, vol. 13, no. 1, 2005, pp. 14-17; see also Ramasastry, A., 'Corporate Complicity: From Nuremberg to Rangoon –An examination of force labor cases and their impact on the liability of Multinational Corporations', *op. cit.*, p. 102.

<sup>498</sup> Clapham, A. and Jerbi, S., 'Categories of corporate complicity in human rights abuses', *op. cit.*, p.347.

Silence is not neutrality. To do nothing is not an option.’<sup>499</sup> However, the above-mentioned idea is generally countered by companies, pointing out that their activities improve the situation of the population in which they operate and that they can constructively involve a repressive government through their presence and, therefore, achieve a change in the government’s human rights policies.<sup>500</sup>

On the other hand, human rights organizations argue that when companies are aware of systematic or ongoing human rights abuses, they have an affirmative duty to raise these issues with the government and try to use their *influence* in a positive way.<sup>501</sup> Silence or inaction can amount to complicity, since it implies, at some level, the tacit approval of the actions of a government instead of a mere neutrality. Therefore, corporations are urged to speak out against violations of human rights and to try to influence the host government to change their wrongful behavior and practices.<sup>502</sup>

### **III.3 Corporate accountability under the existing legal regimes**

Addressing the role of corporations and holding them accountable for human rights abuses has lately received significant attention. This section aims therefore to provide a general assessment of how corporate accountability can be articulated in the different legal systems, both at domestic and international level. In some cases, such as domestic criminal law and civil law of remedies, accountability can be demanded in liability terms. The international level, however, so far does not provide for such kind of mechanisms.

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<sup>499</sup> Avery, C., *Business and Human Rights in a Time of Change*, Amnesty International 2000, (quoting Sir Geoffrey Chandler), p. 50.

<sup>500</sup> Ramasastry, A., ‘Corporate Complicity: From Nuremberg to Rangoon –An examination of forced labor cases and their impact on the liability of Multinational Corporations’, *op. cit.*, p.103.

<sup>501</sup> The concept of sphere of influence has been addressed by John Ruggie in an above-mentioned report. For more information about th, see Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Clarifying the Concepts of ‘Sphere of Influence’ and ‘Complicity’*, A/HRC/8/16 (2008)

<sup>502</sup> Ramasastry, A., ‘Corporate Complicity: From Nuremberg to Rangoon –An examination of forced labor cases and their impact on the liability of Multinational Corporations’, *op. cit.*, p.104.

### III.3. A Criminal law

#### III.3.A.a International and domestic criminal law

International criminal law (ICL) is primarily designed to proscribe international crimes and to impose upon States the obligation to prosecute and punish those crimes.<sup>503</sup> Although it has a different historical origin from human rights law, both bodies of law share a fundamental principle: the protection of, and respect for, humanity.<sup>504</sup>

Since the Nuremberg trials, liability for ‘aiding and abetting’ as form of complicity has become a part of ICL. The Statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda contain a general complicity provision, applicable to all of the offences over which the two tribunals had jurisdiction.<sup>505</sup> According to the ICTR, ‘aiding’ involves giving assistance to someone, while abetting means facilitating the commission of an act by being sympathetic thereto.<sup>506</sup> Although the terminology ‘aiding and abetting’ is not always used in domestic systems, the domestic standards generally resemble the international criminal law concept of ‘aiding and abetting’.<sup>507</sup> But ICL contemplates various forms of criminal accountability, additional to ‘aiding and abetting’, such as instigating, ordering, planning or conspiring to commit a crime. According to the criterion of the International Law Commission (ILC), we can consider all these forms of participation in human rights abuses as forms of corporate

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<sup>503</sup> Cassese, A., *International Criminal Law*, Oxford University Press, 2003. p. 15.

<sup>504</sup> Indeed, according to Cassese, IHRL has contributed to the development of criminal law in many respects. *Ibid.* p.18. See for discussion: International Criminal Tribunal for the Former Yugoslavia (ICTY), Furundzija, (Trial Chamber), 10 December 1998, para. 183; L. Doswald-Beck & S. Vité, ‘International humanitarian Law and human rights law’, in: *International Review of the Red Cross*, no. 293, 1993, pp. 94-119.

<sup>505</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, art.7 (1); Statute of the International Criminal Tribunal for Rwanda, art. 6(1).

<sup>506</sup> ICTR, *Prosecutor v Akayesu* (Case No. ICTR-96-4-T) Judgment, 2 September 1998, para.423. For more information about this issue see Schabas, W., *War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability*, Cameron May, 2008, pp.498-500.

<sup>507</sup> Ramasastry, A. and Thompson, R.C., ‘Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law’, FAFO Report, 2006, Executive Summary, p. 17.

complicity.<sup>508</sup> However, the notion of corporate complicity is not covered by ICL jurisdiction, as only individuals can be brought to the ICC.

Whereas ICL only applies to individuals - so only company officials can be legally prosecuted-<sup>509</sup> national legal systems sometimes include legal entities and companies as prosecutable actors.<sup>510</sup> Similarly, the scope of ICL is in principle limited to the core crimes under international law, which namely are genocide, war crimes, crimes against humanity, and the crime of aggression.<sup>511</sup> Many national jurisdictions have incorporated international crimes into their domestic jurisdiction, as part of their national criminal laws. Others have not, but in most cases this kind of human rights abuses can be investigated and prosecuted under national criminal laws, punishing crimes such as murder, assault and theft. Comparative surveys on domestic law have revealed some similarities but also many differences between States in the way their legal norms and courts have approached criminal liability, such as the standards of attribution of elements of criminal offences, or the legal category of corporate complicity.<sup>512</sup> Thus, regarding legal protection of victims, there are many disparities between national jurisdictions.<sup>513</sup>

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<sup>508</sup> International Law Commission, Yearbook of the International Law Commission, 1996, Vol. II (Part two), UN Doc. A/CN.4/SER.A/1996/Add. I (Part 2), ILC Yearbook 1996) pp., 18-20.

<sup>509</sup> The inclusion of legal entities to the ICC jurisdiction was proposed during the negotiation of the Court's Statute, but it failed. For more info, see Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, *op. cit.* vol. 2, p. 56; or Ambos, K, in Triffterer, O (ed.), Commentary on the Rome Statute, 2008, article 25, margin No.4. There are still some authors who support this inclusion. See for instance Clapham, A., 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', *Journal of International Criminal Justice*, vol. 6, 2008, pp.899-926.

<sup>510</sup> See for instance, Article 121-2 French Criminal Code; Article 5 Dutch Criminal Code.

<sup>511</sup> In addition, international criminal customary law also includes slavery, torture, extrajudicial execution and enforcement disappearance as international crimes. The ICC Statute has also clarified that certain abuses committed during internal armed conflict are also war crimes, such as rape or pillage, Article 8 ICC Statute. Recently (September 2016), the Prosecutor of the International Criminal Court have expanded its focus, which signals a landmark shift in international criminal justice by stating that company executives, politicians and other individuals could now be held criminally responsible under international law for crimes linked to land grabbing and environmental destruction.

<sup>512</sup> For more information about this issue, see for instance Terrill, R., *World Criminal Justice Systems: A Comparative Survey*, Routledge, 2016.

<sup>513</sup> For a useful introduction, see e.g. Ramasastry, A and Thompson, RC, 'Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries' – Executive Summary, FAFO-Report, 2006, p. 536. This report concludes that there is a practice of applying criminal liability in 11 of the countries surveyed: Australia, Belgium, Canada, France, India, Japan, The Netherlands, Norway, South Africa, the United Kingdom and the United States; in five of the countries surveyed there was no such recognition of criminal corporate liability: Argentina, Germany, Indonesia,

Given the *ratione personae* limitations of ICL, domestic criminal law has been often examined to provide some venues to effectively establish corporate liability. Therefore, the next subsections explore elements and mechanisms to hold companies accountable at domestic criminal law, whether as the main perpetrator or because of their complicity in the actions of others.

### **III.3.A.b Corporate criminal responsibility**

Complexity on the treatment of corporate criminal responsibility at domestic level is largely due to the amount of differences between jurisdictions around the sort of organizations that can be held liable, the kinds of offences for which corporate entities can be liable, and the elements required to establish liability.<sup>514</sup> Zerk argues in her report on domestic law remedies for corporate human rights violations that it is possible to divide domestic legal systems into two groups: those that recognise the concept of corporate criminal liability and those that do not.<sup>515</sup> Likewise, within the first group there are further variations in approach: those that recognise corporate criminal responsibility as a general principle under their domestic penal code;<sup>516</sup> those that recognise corporate criminal responsibility but with a list of exceptions; and those that recognise corporate criminal responsibility only where explicitly provided for in the relevant sections of the penal code or specific statute.<sup>517</sup> Regarding jurisdictions that do not recognise corporate criminal responsibility as part of their criminal offences, including countries such as Germany and Italy, this does not mean that corporations enjoy complete impunity. Alternatively, this issue is dealt with through a system of administrative offences and penalties.<sup>518</sup>

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Spain and the Ukraine.. See also International Peace Academy and FAFO AIS, Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law, FAFO Report 2004, p. 467.

<sup>514</sup> For more about a comparative survey see FAFO, Business and International Crimes Project, Available at: <http://www.fafo.no/liabilities/projectdescr.htm>.

<sup>515</sup> Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p.32.

<sup>516</sup> Meaning that all offences that potentially attract individual criminal liability carry the possibility of corporate criminal responsibility as well (except for those offences for which corporate criminal liability is not a logical or physical possibility, such as incest or bigamy).

<sup>517</sup> *Ibid.*

<sup>518</sup> In Germany for instance, corporations can be held financially responsible for monetary penalties where an agent, representative or board member acting in that capacity, has committed an act that results in the violation of a legal duty by the corporate entity.

As corporations are abstract legal constructions, they can only act through human agents. Thus, a method is needed to attribute human acts and omissions to a business enterprise, along with a test to establish whether those acts or omissions should attract criminal liability.<sup>519</sup> There are many different approaches to this question of corporate culpability, depending on the particular offence and the context in which it occurs. According to Zerk, there are two main approaches to this issue: the identification method and organisational approaches. While the first one identifies acts and intentions of corporate officers and senior managers with the company itself,<sup>520</sup> the organisational approach focuses on ‘corporate culture’. Under this second one, the element of ‘fault’ necessary to establish criminal liability can be attributed to a corporation where ‘a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or by proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision’.<sup>521</sup>

### **III.3.A.c Accomplice liability under criminal law**

Domestic criminal regimes conceive accomplice liability in a strict sense, limiting criminal liability to acts that aid, abet or assist in the commission of a crime committed by another. As mentioned above, both international and national criminal laws also criminalise other forms of participation in crimes committed by others, such as instigation, conspiracy or ordering but these are often defined as distinct offences or crimes, or even as a form of criminal liability for perpetration, rather than accomplice liability.

There are many differences between national legal systems concerning the elements that must be proved in order to establish criminal liability. Generally speaking, there must be a causal relationship between the alleged assistance and the crime itself, although the standards of this causality will vary according to the different national systems. Therefore, accomplice liability in national law requires the same two elements

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<sup>519</sup> Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p.33.

<sup>520</sup> Zerk argues that it is usually sufficient for the person to have been acting broadly within the scope of their duties and with actual or apparent authority. *Ibid.*

<sup>521</sup> See Australian Criminal Code Act, Part 2.5, Division 12, section 12.3.

as international criminal law: the *actus reus* and the *mens rea*. The first component refers to the conduct itself or the type of participation. It can be direct (aiding), indirect (providing external support to perpetrator) or silent complicity.

The second element is related to the State of mind, the positive intention to commit the crime. Although this element is defined differently across national jurisdictions, it is always required that the defendant has a particular subjective intention. Some jurisdictions have very strict requirements as to knowledge: the alleged accomplice must not only act intentionally but must also intend the crimes that were eventually committed. Some other jurisdictions applied a lesser standard when requiring that the accessory may not have the same intent as the principal perpetrator but knowing that the outcome was the practical certainty of its actions. Instead, in other cases, it is sufficient to know that criminal acts were the likely consequences of their actions.<sup>522</sup> Depending on the domestic regime, it will vary from mere negligence to cases in which proof of criminal intent will be required.<sup>523</sup>

It is also worth mentioning that, as well as in international criminal law, in national criminal jurisdictions the liability of an accomplice is not dependent on the conviction of the principal perpetrator. Consequently, a company could be held criminally liable even if the principal perpetrator goes unpunished.

### **III.3.A.c Enforcement mechanisms and practical obstacles**

As examined above, at international level, the ICC does not have jurisdiction over legal entities, so it can only bring to justice individuals –in this case, corporate executives or managers- when considering that they acted on behalf of the corporation. However, since corporate officers often only play a supportive role, it has been argued that they have not been considered a priority to date in the Office of the Prosecutor’s (OTP’s) legal strategy.<sup>524</sup> At national level, there is no uniformity regarding regulation

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<sup>522</sup> Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p. 38.

<sup>523</sup> In Argentina, for instance, share intent is required, while in the Netherlands, knowledge or foreseeability of harm is enough to establish liability.

<sup>524</sup> Kaleck, W., and Saage-Maasz, M., ‘Corporate accountability for Human Rights Violations amounting to International Crimes’, *op. cit.*, p. 955.



of different domestic criminal systems. Likewise, there are few legal regimes aimed specifically and explicitly at the problem of corporate involvement in human rights abuses.

With regard to the general practical obstacles to holding companies accountable under criminal law, it is worth mentioning two in particular: the form of punishment and the so-called ‘corporate veil’. Concerning the first one, as a legal person, corporations are likely to face financial penalties.<sup>525</sup> This kind of punishment has a number of limitations though, such as that they do not necessarily have proper deterrent value<sup>526</sup> and they rarely offer any prospect of compensation for victims.<sup>527</sup> Likewise, corporations are generally characterized by impenetrable structures and complex supply-chains that mean that responsibilities can be shared between numerous officers. In the same way, since corporations are not required to expose internal documents, access to sensitive information and fact-finding is a challenging task.<sup>528</sup>

On the other hand, the prosecution of extraterritorial human rights abuses raises both legal and practical challenges.<sup>529</sup> States enjoy a limited degree of extraterritorial jurisdiction under customary international law related to the principle of universality,<sup>530</sup> which refers to the international law doctrine that provides them the right to assert jurisdiction over perpetrators of certain very serious violations, wherever in the world those crimes have taken place. In practice, however, in most jurisdictions the defendant must be present in the jurisdiction for a prosecution to proceed, in what is commonly

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<sup>525</sup> Natural persons will face prison sentences instead.

<sup>526</sup> They may, for instance, be treated simply as a ‘cost of doing business’. Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p. 39.

<sup>527</sup> Although some jurisdictions, such as France, Norway and Germany, permit the joining of civil actions with criminal proceedings through which compensation for victims can be claimed. *Ibid.*

<sup>528</sup> See for instance, Macey, J. and Mitts, J., ‘Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil’, *Cornell Law Review*, vol.100, issue 1, 2014, pp.99-156.

<sup>529</sup> See generally on the topic of extraterritoriality, Fernández Sánchez, P.A., ‘La aplicación extraterritorial de los Derechos Humanos por acciones de empresas’, in Díaz Barrado, C. M., Fernández Liesa, C.R., and Verdiales López, D.M., *Objetivos de desarrollo sostenible y Derechos Humanos: paz, justicia e instituciones sólidas / Derechos Humanos y empresas*, Universidad Carlos III de Madrid. Instituto de Estudios Internacionales y Europeos Francisco de Vitoria, 2018, pp. 57-60.

<sup>530</sup> Den Herik, L., and Letnar Cernic, J., ‘Regulating Corporations under International Law From Human Rights to International Criminal Law and Back Again’, *Journal of International Criminal Justice*, vol. 8, 2010, p.740. For further information about extraterritoriality see Vandenhoe, W., *Challenging Territoriality in Human Rights Law, Building Blocks for a Plural and Diverse Duty-Bearer Regime*, Routledge, 2015.

known as ‘restricted’ or ‘territorial’ universality. This additional requirement raises the interesting issue of when a corporation might be regarded as being present in the jurisdiction for the purpose of a prosecution based on universal jurisdiction. Ultimately, extraterritorial crimes can be extremely difficult to investigate in practice, without practical support from other affected States.<sup>531</sup>

Generally, investigations are difficult and cost-intensive. Additionally, in situations of political transition, as well as in ongoing conflicts, impunity is widespread, so often efforts of fact-finding are limited to concentrating on the direct perpetrators and the ‘main’ atrocities. It is thus paradoxical that, since business actors generally operate in these contexts, their involvement in human rights abuses and crimes is often not at the centre of investigations, neither in national or international prosecutions nor in UN missions or transitional justice mechanisms.<sup>532</sup>

### **III.3. B Civil law of remedies**

Apart from criminal proceedings, most domestic jurisdictions also provide for the possibility of access to remedy through private law claims for damages for wrongful behaviour. In line with the criterion of the ICJ Panel, we will use the term ‘law of civil remedies’ to refer to both the law of tort in common law legal systems and the law of non-contractual obligations in civil law jurisdictions.<sup>533</sup> These two bodies of law regulate and provide for civil liability where harm is caused to someone as a result of another actor’s behaviour and where that actor and the victim are not in a contractual relationship.

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<sup>531</sup> Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’, *Working Paper of the Harvard Corporate Social Responsibility Initiative*, no.59, 2012, p. 142.

<sup>532</sup> Fortunately, this trend is currently changing and some Truth Commissions, for instance, have started to include corporate involvement in human rights abuses within the framework of their mandates. See for instance Truth Commission of Sierra Leona, Report Volume 3.b. Full document available at <http://www.sierraleonetr.com/index.php/view-the-final-report>

<sup>533</sup> The terminology used throughout jurisdictions to describe this area of law can vary depending on jurisdiction, from the law of non-contractual, to extra-contractual liability, to civil responsibility for delicts/quasi-delicts. Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability*, Volume III, 2008, p.3.

Parallel civil and criminal proceedings are permitted for many jurisdictions arising from the same wrongful corporate behaviour. As there are different standards of proof, it is not unusual that civil law claims succeed despite criminal prosecutions not doing so.<sup>534</sup> It is also worth mentioning at this point that many jurisdictions do not provide for punitive damages in civil law of remedies, on the basis that compensation is intended to be compensatory, not punitive.<sup>535</sup>

### **III.4. B. a Elements of legal liability**

Despite some terminological differences, one actor can be held liable under the law of civil remedies based either on the intentional conduct or negligence as long as the conduct causes harm to someone else.<sup>536</sup> Given that one of the main purposes of this branch of law is to provide remedies to those who have suffered harm, damage must be real and proved to an interest that the law protects. Some jurisdictions explicitly name the protected interest for which remedies may be available.<sup>537</sup> Many others, however, do not explicitly limit the situations in which a remedy may be available through civil or common law, so the courts will decide in every case in particular.<sup>538</sup> Tort law in common law jurisdictions is more likely to follow this second category. In any case, in all jurisdictions, the law of civil remedies can be invoked to remedy harm to life, liberty, dignity, physical and mental integrity and property.<sup>539</sup>

Notwithstanding the above noted, only the United States has developed a civil recovery regime specifically for gross human rights abuses. So, in the other jurisdictions, plaintiffs must bring their claim within the parameters of established bases of liability under domestic law.<sup>540</sup> While in many jurisdictions it is not difficult to frame

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<sup>534</sup> That will be ‘beyond reasonable doubt’ in criminal cases and ‘balance of probabilities’ in civil and tort cases.

<sup>535</sup> Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p.45.

<sup>536</sup> For more information and examples, see *International Encyclopaedia of Comparative Law*, Brill, 2015, p.5, et seq.

<sup>537</sup> See for instance: Article 82, German Civil Code.

<sup>538</sup> See for instance Article 1089 Spanish Civil Code; or Article 1382, French Civil Code.

<sup>539</sup> Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability*, Volume III, *op. cit.*, p. 11.

<sup>540</sup> Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p. 45.

gross human rights abuses in tort law,<sup>541</sup> there are a number of gross human rights abuses that do not fit easily into categories already established of tort law, such as the crime of *apartheid*, for instance.

Intentional or negligent conduct that causes harm to legally protected interests could give rise to civil liability. Regarding *intentional conduct*, it is commonly agreed – despite some differences in terminology- that an actor could be considered as acting intentionally when it voluntarily undertook a course of conduct knowing that it was more likely to result in harm.<sup>542</sup> Only few jurisdictions require the existence of malicious intention to harm.<sup>543</sup>

Likewise, malicious intention is irrelevant to establish *negligence* in both civil and common law jurisdictions, in which an actor may be considered negligent when the law considers that in the particular circumstances, it should have foreseen the risk. In common law jurisdictions, this issue is expressed as duties and standards of care.<sup>544</sup> Consequently, the claimant must firstly show that there was a duty of care; secondly, that this duty was breached; thirdly, that the breach of duty resulted in damage or loss to the claimant and, finally, the damage suffered was not too remote to justify compensation.<sup>545</sup> Ultimately, a company can be held legally responsible for negligence if it does not take the care required by the law of civil remedies.

Bearing in mind that in these cases the defendant is a corporation rather than a natural person, the actions and the intention –or knowledge- can be imputed to the corporate body as it can be done in criminal cases. Consequently, in most jurisdictions, imputation will take into account what was known and done by the company's executives.<sup>546</sup>

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<sup>541</sup> For instance, the crime of torture could be framed in terms of 'assault or battery', as well as the crime of 'enslavement' that could fall within the tort of 'false imprisonment'

<sup>542</sup> Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity & Legal Accountability, Volume III, *op. cit.*, p.13.

<sup>543</sup> *Ibid.*

<sup>544</sup> *Ibid.*

<sup>545</sup> Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p. 44.

<sup>546</sup> Zerk denominates 'directing mind and will'. *Ibid.*

### III.4. B. b. Causation and complicity

A causal connection between the conduct and the harm is required to set down civil liability. In establishing this causality, courts take into account whether or not the concerned conduct was a condition without which the harm would not have occurred.<sup>547</sup>

Causation often involves looking behind the principal perpetrator and understanding the numerous factors that have made the perpetration of those abuses possible. Therefore, the company's participation could vary, for instance, from providing the principal actor with goods or tools used to cause the harm, to direct and active participation in the harm suffered by having business partnerships that incurs on that. Although this sort of conduct is ordinarily regarded a normal part of doing business, they can be considered to be a cause of harm.<sup>548</sup>

When establishing the causation link, courts will take into account different factors depending on the specific circumstances.<sup>549</sup> In this respect, the concept of 'reasonable foreseeability' is an objective standard that determines how a prudent person would have acted in these circumstances and consequently, it plays an important role in establishing both negligence and causation. The notion of 'reasonable foreseeability' concerning negligence is about how likely that harm was caused by the actor's negligent conduct, whereas in the context of causation, the question is how likely the damage actually suffered would be caused by the negligent conduct.<sup>550</sup>

On the other hand, it has been often argued by companies that a causal nexus cannot be established because the abuses would have occurred anyway, even if the company had not been involved. As the ICJ clarifies, the issue at this point is not whether the violations would have occurred without the company's participation, but

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<sup>547</sup> Hoffman, L., 'Causation', *Law Quarterly Review*, vol.121, 2005, p. 592.

<sup>548</sup> Any particular kind of business dealings and transactions, such as selling and providing goods and services, purchasing in a supply chain, financing or entering into a joint venture, can be alleged to be an intrinsic part of a chain of causation leading to the infliction of harm through gross human rights abuses. Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity & Legal Accountability, Volume III, *op. cit.*, p.23.

<sup>549</sup> See for instance Article 3:201, Principles of European Tort Law, Available at: [www.egtl.org](http://www.egtl.org)

<sup>550</sup> Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity & Legal Accountability, Volume III, *op. cit.*, p.24-25.

rather whether the specific harm suffered by a specific victim was caused by the company's conduct.<sup>551</sup>

Notwithstanding the above, the chain of causation between the corporation's act and the harm can be broken sometimes. This is commonly known as *novus actus interveniens* or 'intervening act'. In these cases, the causal nexus between the company's conduct and the harm may be insufficiently direct because the damage would be too remote from the company's conduct or is no longer an inevitable consequence of the defendant's act or omission.<sup>552</sup>

#### **III.4. B. c. Allocating liability within corporate groups**

One particular feature of many corporations nowadays is the complexity of modern business structures, usually consisting of a parent company with many subsidiaries, which can have other subsidiary companies at the same time or can even sometimes involve entering into a business agreement with other companies for which a new business entity is made up.

Bearing this in mind, there are many reasons why it may be relevant to consider the involvement of a parent company in the conduct of its subsidiary when allegations of complicity in human rights violations arise. Amongst them, we can note for instance, cases in which the parent company tolerated the conduct that produced the wrongdoing or perhaps went beyond it, directing and approving the harm. Nevertheless, according to the doctrine of a separate corporate personality,<sup>553</sup> members of the corporate group are considered as legally autonomous and consequently, they will not automatically be held legally responsible for the acts or omissions of another. The behaviour of each company within the corporate group is individually assessed. This legal separation means that, for

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<sup>551</sup> *Ibid.*

<sup>552</sup> The Panel indicates that it is however very unlikely that another actor's intentional conduct will be considered to constitute an intervening act if that conduct was foreseeable and the company had a special relationship with the actor.

<sup>553</sup> On this topic, see for instance James, N., 'Separate Legal Personality: Legal reality and Metaphor', *Bond Law Review*, vol. 5, issue 2, 1993, pp. 217-228; for a comparative study see also Cheng, T. K., 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines', University of Hong Kong Faculty of Law Research Paper, 2011, pp. 1-83.

the purposes of addressing legal responsibility, the conduct of a subsidiary will not be identified with its parent company.<sup>554</sup> Some domestic legal systems do permit ‘piercing of the corporate veil’ in very limited circumstances, the result being that other companies in a corporate group -generally the parent company- can be held responsible for the acts of subsidiaries.<sup>555</sup> In most jurisdictions there are only two ways to establish parent company liability in parallel to subsidiary company liability: when the courts estimate that the doctrine of separate legal personality is being abused to perpetrate fraud or avoid existing legal obligations; and when the conduct of the parent company itself was, as the subsidiary, also negligent or intentional.<sup>556</sup>

There have been attempts to incorporate some different theories such as the ‘enterprise theory’ or the ‘agent theory’ into domestic jurisdictions in order to hold parent companies liable, but they have been largely unsuccessful. Enterprise theory basically argues that members of a corporate group should be jointly and separately liable for harm caused by their group activities, as they are actually the same economic enterprise. The agent theory notes that the principal is liable for the acts of its agent acting within the scope of authority.<sup>557</sup> Domestic courts have tended to reject these arguments on the basis that they undermine basic tenets of company law.<sup>558</sup>

### **III.3. B. d. The Alien Tort Statute**

To date, the main forum for corporate human rights abuses litigation has been the Alien Tort Statute in the United States, which allows non-US citizens (aliens) to file tort-based claims in United States courts for human rights abuses against non-US

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<sup>554</sup> See for instance Millon, D., ‘Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability’, *Emory Law Journal*, vol. 56, Number 5, 2007.

<sup>555</sup> This may be the case where the parent company is particularly involved in the activities of the subsidiary, to an extent greater than what would normally be expected in a parent/subsidiary relationship.

<sup>556</sup> Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Corporate Complicity & Legal Accountability, Volume III, *op. cit.*, p.47.

<sup>557</sup> See for instance Skinner, G., ‘Parent company accountability, Ensuring Justice for Human Rights Violations’, Report of the International corporate accountability roundtable, 2015, p. 15-17. Document available at <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/591c8ebdbf629a23e7e35da0/1495043779017/PCAP+Report+2015.pdf> accessed 15 April 2018.

<sup>558</sup> However, as Zerk pointed out, there is some domestic law jurisprudence in support of the idea, arising from cases in the United Kingdom and India. Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p. 46.

companies, even if the harm took place outside the United States.<sup>559</sup> Although the Statute dates back to the 18<sup>th</sup> century, it was not until 1980 that it was successfully invoked in a human rights claim in the case *Filártiga v. Pela-Irala*.<sup>560</sup> Since then, more than 150 complaints have been filed against companies under this statute, many of them following the extraterritorial application of it. However, the US Supreme Court's decision in the *Kiobel* case narrowed the extraterritorial application of the ATS to cases that 'touch and concern the territory of the United States'.<sup>561</sup>

Notably, the notion of corporate complicity in human rights violations has been given much consideration by US courts under this Statute, although they have not yet defined it clearly and uniformly.<sup>562</sup> In this sense, Maassarani usefully identifies four categories of business behavior considered as illegal conduct under the ATS: (1) joint criminal enterprises; (2) conspiracy to violence; (3) instigation of violence with knowledge of outcome; and (4) procurement, or profiting from sales or services knowing that it contributes to violence but without necessarily having criminal intent.<sup>563</sup> It is relatively rare that a corporation is sued in the US Courts under the Statute as the primary perpetrator, so most of the cases concern situations where corporations are alleged to have contributed, in any of the above-mentioned ways, to State or armed group violations.<sup>564</sup>

The US courts have been gradually redefining what violations concern non-State actors, such as companies. Accordingly, genocide, slave trading, slavery, forced labour

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<sup>559</sup> For an overview of the history of ATS litigation against corporate actors see: McBarnet et al., 'Corporate Accountability through Creative Enforcement: Human Rights, the Alien Tort Claim Act and the limits of Legal Impunity' in MacBarnet et al (Eds), *The New Corporate Accountability. Corporate Social Responsibility and the Law*, 2007.

<sup>560</sup> Two Paraguayan citizens claimed against a former Paraguayan police official for torturing a member of their family in Paraguay. The defendant was based in the United States at the time of the case.

<sup>561</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). For more info about this case, see Stewart, D., and Wuerth, I., 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme court and the Alien Tort Statute'. *American Journal of International Law*, vol. 107, no. 3, 2013, pp. 601-621; Giannini, T., and Farbstein, S., 'How Kiobel Undermines the Nuremberg Legacy & Modern Human Rights', *Harvard International Law Journal Online*, Vol. 52, 2010.

<sup>562</sup> Two relevant cases in this sense are *Doe v. Unocal* 395 F. 3d 932 (9Cir. 2002) and *Presbyterian Church of Sudan v. Talisma Inc*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006). See Kuuya, V., 'Corporate Complicity In Human Rights Abuses. A Discussion Paper', 2008.

<sup>563</sup> Maassarani, T.F., 'Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act', 2005, *New York University Journal of International Law & Politics*, vol. 38, pp.39-65.

<sup>564</sup> Zerk, J., *Corporate liability for gross human rights abuses, op. cit.*, p.24.



and war crimes have been determined as actionable, even in the absence of any connection to State action.<sup>565</sup> In addition, according to the *Kadic v. Karadzic* judgment, where rape, torture and summary execution are committed in isolation, these crimes ‘are actionable under the Alien Tort Act, without regard to State action, to the extent they were committed in pursuit of genocide or war crimes’.<sup>566</sup> Thus, regarding the domestic law response to human rights violations, the United States has been exceptional allowing –so far- the option of seeking private law reparations under the ATS. However, following the decision of the Supreme Court in *Kiobel*, US courts seem to be taking an increasingly restrictive approach to the scope of this Statute.

### **III.3. B. e. Enforcement mechanisms and practical obstacles**

As well as criminal law, civil law of remedies claims generally faces the problem of the attribution of responsibility, the causality for damages, and the subjective standard of intent or negligence. This is mainly due to the complex nature of the human rights abuses and the corporate structures. Generally speaking, the greatest obstacle for holding corporations accountable is the attribution of the torturous acts to the company’s headquarters, what is also commonly known as ‘piercing the corporate veil’. As Taylor, Thompson and Ramasastry have pointed out ‘it is often difficult to identify the particular business entity involved in an alleged violation. Even assuming that one can identify the particular entity, the use of intermediary holding companies, joint ventures, agency arrangements and the like, often protected by confidentiality arrangements, makes it difficult or impossible to establish a connection between the entity and its parent ownership’.<sup>567</sup> So far, most domestic jurisdictions are cautious and they only seem to be prepared to recognise the possibility of parent company liability in limited circumstances.<sup>568</sup>

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<sup>565</sup> See for instance, *Doe v. Unocal*, (2002) 395 F.3d 932

<sup>566</sup> *Kadic v. Karadzic* 70 F. 3d 232 at 243–244 (2d Cir. 1995) cited with approval in *Doe v. Unocal* (2002).

<sup>567</sup> Taylor, M.B., Thompson R.T, and Ramasastry, A., ‘Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses’, FAFO Report 2010, p.10-11.

<sup>568</sup> For instance, in the US, the parent company could possibly be based on direct liability or secondary theories of liability. On the other side, under French jurisdiction, the theory of parent company liability could be developed where there is a high degree of involvement by the parent in the running of the

Another relevant issue at this point is how to establish the corresponding jurisdiction. Under the principle of territorial sovereignty, national courts have the right over civil claims within the territorial boundaries of their own State and when the defendant has a link to the jurisdiction itself.<sup>569</sup> When involving companies, most domestic jurisdictions require that the company be domiciled or incorporated in the jurisdiction. However, in many instances, claimants will seek an alternative jurisdiction, usually due to their concerns about lack of impartiality or the capacity of the local courts to hear the claim in a timely fashion.<sup>570</sup> Similarly, alternative jurisdictions may also be more advantageous to claimants in terms of sources of funding or procedural considerations. With regard to the question of which country's law should be applied, the historical rule in private international law has been the *lex loci delicti*, which means that the law applicable was that of the country in which the harm occurred. However, some countries have developed a number of exceptions to this rule, such as the US.<sup>571</sup> At the EU level, the adoption of a new EU regulation in 2009 – Rome II-<sup>572</sup> unified within the Union borders the general principles of private international law.<sup>573</sup>

There are also some cases in which the claimants will have to deal with the argument that the matter is covered by *sovereign immunity* or that the court should decline to exercise jurisdiction on the basis that the case concerns a *non-justiciable political question*. The practical consequence of the first one can be that, in the case of a joint venture between a private company and a State-owned entity for instance, it may

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subsidiary. See Zerk, J., *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, Cambridge University Press, 2006, pp. 215-240.

<sup>569</sup> When involving companies, most domestic jurisdictions require that the company be domiciled or incorporated in the jurisdiction. For a comparative analysis, see the Fourth and Final Report: Jurisdiction over Corporations, by the International Law Association, Committee on International Civil and Commercial Litigation. Full document available at <http://www.vansandick.com/familie/links/ilareport.php> accessed 18 April 2018.

<sup>570</sup> A number of civil law States (e.g. Argentina, France, Germany, Canada (Quebec) also recognise a doctrine of 'forum of necessity' (*forum necessitas*) under which the courts can take jurisdiction over a matter where it appears that there is no other forum available to victims.

<sup>571</sup> Although the starting point is that the law of the place in which the harm occurred should prevail, a level of flexibility, discretion and choice exists for courts as to what law they apply.

<sup>572</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). Full document available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF> accessed 17 April 2018.

<sup>573</sup> Ryngaert, C., 'Universal Tort Jurisdiction over Gross Human Rights Violations', *Netherlands Yearbook of International Law*, vol. 3, 2007, p. 42. Ryngaert sees the commitment of the EU to universal criminal jurisdiction as one explanation for this situation.

only be possible to proceed against the private entity.<sup>574</sup> On the other hand, the *non-justiciable political question* is usually related to the context of domestic foreign policy, when arguing that there can be possible inconsistencies in approach between the executive and the judiciary. While the circumstances in which a defendant can rely on this doctrine are quite limited in theory, many of the ATS-based cases profiled above have been challenged on this basis.<sup>575</sup>

Furthermore, a more indirect way of holding corporations accountable for their human rights violations is to rely on consumer protection laws. According to some scholars<sup>576</sup> it should be possible to bring a civil claim against a corporation based on allegations of false advertisement, when a corporation that is actually involved in human rights abuses committed itself to a code of conduct guaranteeing the respect of human rights in its business practices. However, very few lawsuits have been brought forth on this basis to date.<sup>577</sup>

### **III.3. C International Human Rights Law<sup>578</sup>**

#### **III.3. C. a. Background and recent developments**

It is still largely and openly debated whether non-State actors, and in particular corporations, are bound by international law. States are still today the primary subjects

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<sup>574</sup>In *Doe v Unocal*, for instance two US courts held (at first instance and again on appeal) that the Burmese military and the State Oil and Gas Enterprise could not be made subject to ATS-based claims. An ATS-based claim brought by holocaust survivors against the French State-owned train company SNCF was also dismissed on this basis.

<sup>575</sup>Under this doctrine, courts have declined jurisdiction over matters that raise issues properly dealt with by the political branches of government. See Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p. 68.

<sup>576</sup>Kaleck, W. and Saage-Maasz, M., 'Corporate accountability for Human Rights Violations amounting to International Crimes', *op. cit.*, p. 718.

<sup>577</sup>ECCHR initiated such a complaint against the German discounter Lidl in April 2010. The complaint resulted in swift success: a few weeks after the complaint was made, Lidl agreed in a declaration to the Consumer Protection Agency to retract the claims made in the advertisements regarding fair working conditions. Available at [https://www.ecchr.eu/en/our\\_work/business-and-human-rights/working-conditions-in-south-asia/bangladesh-lidl.html](https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/bangladesh-lidl.html) accessed 19 April 2018.

<sup>578</sup>International Humanitarian Law may also have implications for corporations which operate in conflict situations. However, it is difficult to assess how these corporations, and their personnel, are limited in their activities by IHL. See for instance, ICRC, 'An introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law', 2006. Available at [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0882.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf)

within the traditional concept of public international law.<sup>579</sup> Thus, the status of non-State actors is a continuous conceptual problem in international law and, probably, the main reason for the lack of enforcement mechanisms against corporations at the international level.<sup>580</sup> However, as mentioned above, this has been challenged by many authors who support the idea that the imposition of international legal obligations on non-State actors –and specifically, corporations- is needed. According to them, corporations could be held accountable for human rights violations alongside States.<sup>581</sup> Clapham, for instance, summarises this idea as follows:

‘We have an international legal order that admits that States are not the only subjects of international law. It is obvious that non-State entities do not enjoy all the competences, privileges, and rights that States enjoy under international law, just as it is clear that States do not have all the rights that individuals have under international law (...) We need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity.’<sup>582</sup>

Be that as it may, developments in the field of business and human rights have been made so far in the way of soft law initiatives, which means that international instruments other than a treaty that contains norms and standards of expected behavior.<sup>583</sup> While they are not legally binding, they have force by virtue of the consent

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<sup>579</sup> Clapham, A., *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 25-57.

<sup>580</sup> For an overview of the conceptual problems, see Den Herik, L., and Letnar Cernic, J., ‘Regulating Corporations under International Law from Human Rights to International Criminal Law and Back Again’, *op. cit.*, pp. 725-743.

<sup>581</sup> See for instance, Alston, P (ed.), *Non-State Actors and Human Rights*, Oxford University Press, 2006; De Schutter, O., (ed.), *Transnational Corporations and Human Rights*, Hart Publishing, 2006; De Brabandere, E. ‘Non-State Actors, State-Centrism and Human Rights Obligations’, *Leiden Journal of International Law*, vol. 22, 2009, pp.191-209; Martin - Ortega, O., *Empresas Multinacionales y Derechos Humanos en Derecho Internacional*, Bosch Editor, 2008.

<sup>582</sup> Clapham’s approach to this question is principally centered on a reconceptualization of the international legal personality of actors and the capacity to bear obligations under international law Clapham, *Human Rights Obligations of Non-State Actors*, *op. cit.*, pp. 68-69.

<sup>583</sup> The business and human rights movement has been in existence since the late 1970s. As Ramasastry points out, this movement has been focusing on the human rights impact of business, mostly Transnational Companies in their global operations. See Ramasastry, A., ‘Corporate Social Responsibility

that government, companies and other civil society actors accord them. Amongst the most relevant initiatives, we find the OECD Guidelines for Multinational Enterprises<sup>584</sup> and the ILO Tripartite Declaration of Principles concerning multinational enterprises and social policy.<sup>585</sup>

In a nutshell,<sup>586</sup> at the same time that the UN launched the Global Compact,<sup>587</sup> efforts were being made at the UN Human Rights Commission to create a set of *Norms* that would govern the conduct of transnational corporations with respect to human rights (Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights or briefly called Draft Norms, 2003).<sup>588</sup> However, the Draft Norms were eventually tabled after drawing criticism from business and from developing States. In this context, in 2005, the UN Secretary General appointed Professor John Ruggie as the Special Representative to the Secretary General on Business and Human Rights, to map the existing landscape of business obligations in international human rights law. The culmination of his six-year extensive efforts and consultations led to the UN Human Rights Council unanimously endorsing a new document: the UN Guiding Principles on Business and Human Rights.

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versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability', in *Journal of Human Rights*, vol. 14, 2015, p.240.

<sup>584</sup> First adopted in 1976, they have been revised and updated through the years. The last update was after the adoption of the UN Guiding Principles in 2011. Available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 19 April 2018.

<sup>585</sup> Revised in 2000 and 2006, the ILO Declaration includes all the recognised labour standards and contains an exhaustive list of labour rights. Likewise, some of the most important concepts have been added to the OECD Guidelines (Chapter V on employment and industrial relations). Full document available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf) accessed 19 April 2018.

<sup>586</sup> For a further analysis on the history and evolution of business and human rights framework, see for instance: Deva, S. and Bilchitz, D., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Cambridge University Press, 2013.

<sup>587</sup> With ten principles, the UN Global Compact asked companies to measure their conduct against key international human rights law and to avoid being complicit in human rights violations. See <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 20 April 2018.

<sup>588</sup> UN Norms limited the catalogue of rights that ought to be relevant for corporations. However, they were expansive on the duty side, extending corporate responsibilities, not only to comprise respect for human rights but also their protection and promotion.. Deva, S. and Bilchitz, D., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, *op. cit.*, p.20.

### **III. 3. C. b. The UN Guiding Principles on Business and Human Rights**

The UNGPs have three pillars that represent key precepts. The First Pillar addresses the State duty to protect against human rights abuses by third parties, including business; the Second Pillar deals with the corporate responsibility to respect human rights; and the Third Pillar calls for States and the business sector to provide victims with access to effective remedies, judicial and non-judicial.<sup>589</sup>

While the UNGPs' provisions are technically non-binding, they contain restatements of existing international law requirements and their unanimous endorsement is also highly significant as evidence of an emerging international consensus in this field. Moreover, key elements of the UNGPs have been incorporated in a number of other international instruments and standards. This high level of support is also clear from the work of regional organizations. The European Commission, for instance, has urged all EU Member States to produce 'action plans', setting out how they propose to implement the UNGPs within their own jurisdictions,<sup>590</sup> and ASEAN and the African Union are also reported to be exploring ways to align their own programmes with the UNGPs. With regard to the Inter-American System of Human Rights and the Organisation of American States, some countries in the region have been particularly supportive of the development of a binding treaty on the topic but only a few countries -such as Colombia- have taken steps to implement the Ruggie Framework.<sup>591</sup>

- **Pillar I: The State's duty to protect**

As Principle 1 of the UNGPs stresses, the States have the duty under international law to protect individuals and communities from human rights violations within their own territory. This duty certainly includes the responsibility to protect

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<sup>589</sup> Ruggie, J., *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31. Geneva, Switzerland, 2011.

<sup>590</sup> A renewed EU strategy 2011-2014 for Corporate Social Responsibility, COM (2011) 681 final.

<sup>591</sup> For more info and a comparative perspective of the EU and the OAS, see Cantú Rivera, H., 'Regional Approaches in the Business & Human rights field', *L'Observateur des Nations Unies*, (2013)-2, vol.35.

against human rights abuses committed by third parties which naturally includes business enterprises.<sup>592</sup>

Given the fact that companies are often involved in transnational economic activities –whether as an investor, buyer or seller- the issue of *extraterritoriality* arises at that point. The UNGPs hold that ‘States are not (at present) generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction’. However, home States should ‘set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations’.<sup>593</sup>

Since ‘the risk of gross human rights abuses is heightened in conflict affected areas’, the UNGPs recommend that States take additional steps to ‘ensure that business enterprises operating in those contexts are not involved with such abuses’.<sup>594</sup> In fact, the explanatory commentary of the Principle 7 goes on to explain that in these contexts, ‘the host State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their home States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuses’.<sup>595</sup>

As part of their duty to protect, States should, according to the Guiding Principles ‘take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy’.<sup>596</sup>

- **Pillar II: The corporate responsibility to respect**

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<sup>592</sup> UN Guiding Principle, Principle 1.

<sup>593</sup> Guiding Principle 2.

<sup>594</sup> Guiding Principle 7. For a deeper analysis of UN Guiding Principle 7 see Mares, R., ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *op. cit.*, pp.293-345.

<sup>595</sup> Guiding Principle 7, Commentary.

<sup>596</sup> Guiding Principle 26

The UNGPs establish that the corporate responsibility to respect ‘is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights’.<sup>597</sup>

In order to meet this responsibility, ‘human rights due diligence’ is required at operational level, which is understood as ‘the steps a company must take to become aware of, prevent and address adverse human rights impacts.’<sup>598</sup> According to Principle 17, human rights due diligence comprises the following four main steps: impact assessment, taking ‘appropriate action’ to deal with the impacts, tracking performance and communicating it publicly. Expected responses for negative impacts include ceasing own harmful activities, ceasing own contributions or trading relationships with irresponsible contractors.<sup>599</sup> In any case, remediation of impacts is only called for when a company caused or contributed to harm, but not when a company merely had a business relationship with the main perpetrator.<sup>600</sup>

As noted above, some businesses operating in some specific environments, such as conflict-affected areas, carry greater risks of being involved in human rights violations than others. According to the explanatory Commentary of Principle 23, ‘business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal liability’.

It is important to note that both the UNGPs and the SRSG did not broaden the responsibility to respect and they do not request companies to do more than merely respect human rights. Thus, the corporate responsibility does not expand to include ‘protect’ or ‘fulfill’ elements.

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<sup>597</sup> Guiding Principle 11, Commentary.

<sup>598</sup> Guiding Principle 13. This Principle also explains that a company has a responsibility to respect when it causes, it contributes to or is directly linked through its business relationships to an abuse.

<sup>599</sup> Guiding Principle 19, Commentary.

<sup>600</sup> Guiding Principle 22.



Moreover, the distinction between ‘duty’ and ‘responsibility’ in the context of UNGPs is also a relevant issue. Since it is the State that consents with its signature and/or ratification to be party to a particular international agreement, it is therefore the State which is duty-bound to observe its provisions. Corporations are not a part of this sort of agreement, so they only have a responsibility to respect them. Thus, ‘duty’ invokes a primary moral or legal obligation while ‘responsibility’ involves accountability for praise or blame for possible consequences.<sup>601</sup>

- **Pillar III: The right of access to remedy**

Victims of abuses of international human rights law have the right to seek redress to an effective remedy. This right is recognised in numerous international human rights instruments and as part of States’ customary obligations.<sup>602</sup>

The UN Guiding Principles compile both judicial and non-judicial grievance mechanisms that can be strengthened by both States and businesses. As part of their duty to protect, States must take appropriate steps to ensure that when abuses occur, victims have access to effective judicial and non-judicial State-based grievance mechanisms. On the one hand, judicial processes are made available through a State’s judicial system and can refer both to private claims for remedies and to domestic criminal law processes.<sup>603</sup> On the other hand, non-judicial processes refer to dispute resolution mechanisms that operate outside the domestic judicial system, such as ombudsmen services and mediation. All non-judicial grievance mechanisms should meet key effectiveness criteria by being legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and (in the case of operational-level mechanisms) based on dialogue and engagement.<sup>604</sup>

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<sup>601</sup> Business and human rights: further steps toward the operationalization, Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, J. Ruggie, 2010, A/HRC/14/27/2010, para. 55.

<sup>602</sup> Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p.56.

<sup>603</sup> Remedies will often include financial compensation but are not necessarily limited to it. According to the words of the UN Guiding Principles, ‘effective judicial mechanisms are at the core of ensuring access to remedy’. Guiding Principle 26, Commentary.

<sup>604</sup> Guiding Principle 27.

Furthermore, the UN Guiding Principles distinguish between ‘State-based’ and ‘non-State-based’ mechanisms. While the first ones have some official status within the domestic legal system,<sup>605</sup> non-State-based mechanisms are private in nature and should complement State-based mechanisms. They include mechanisms at the company operational level, at the national level, or as part of multistakeholder initiatives or international institutions. Along with the responsibility to ensure access to remedy, States will also have responsibilities to ensure that judicial resources are well deployed.

### **III. 3. C. c Enforcement mechanisms and practical obstacles**

Despite the open debate around hypothetical human rights obligations of non-State actors, subjectivity in Public International Law is still limited to States, so it is probably unsurprising that there is a lack of enforcement mechanisms for corporate human rights violations at International human rights level. The UNGPs on its side, distinguishes between ‘State-based’ and ‘non-State-based’ mechanisms, as noted above, but they do not create or suggest any other new mechanism to ensure the fight against impunity for corporate abuses. There are some alternative International Complaint Mechanisms and standard-settings such as the ones contained in the ILO Conventions or the OECD Guidelines for Multinational Enterprises but as happens with the UNGPs, all these norms are soft law so they do not have a binding character.<sup>606</sup> Some of these standards are accompanied by non-legal complaint mechanisms. For instance, the Tripartite Declaration of Principles concerning Multinational Enterprises can register complaints against member States/corporations for non-fulfillment of obligations but this is limited for victims of International Crimes.<sup>607</sup>

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<sup>605</sup>According to the Commentary to Principle 25 they ‘may be administered by a branch or agency of the State or by an independent body on a statutory or constitutional basis’. State-based mechanisms include judicial processes but may also refer to other statutory dispute resolution bodies.

<sup>606</sup>Although these instruments are technically non-binding, their provisions include re-Statements of existing international law obligations. At the very least, they are evidence of an emerging consensus concerning the steps that States should now be taking, and the areas that need to be prioritised for action, in order to meet their responsibilities towards victims in cases where businesses are implicated or involved in gross human rights abuses.

<sup>607</sup>Neither individual victims nor civil society organizations can initiate proceedings or be otherwise involved. Indeed, the ILO member States and representatives of employers and employees are the only entities to be able to do so. Available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf) accessed 20April 2018.

At the regional level, the IACHR has been increasingly compelled to address corporate human rights violations. In doing so, the Commission has held numerous thematic hearings on the threat of corporate activities on human rights,<sup>608</sup> drafted thematic reports to address the issue,<sup>609</sup> and granted precautionary measures.<sup>610</sup> However, when reviewing the Commission's decisions and the Court's jurisprudence we find that although cases involving human rights violations by companies have been addressed, they have rarely analysed the role played by either the businesses or their complex interactions with the conduct of States.<sup>611</sup>

The ECtHR has clearly identified its position in the judgement of *Florin Mihăilescu v. Romania* where the Court expressed that it has no jurisdiction to consider applications directed against private individuals or businesses.<sup>612</sup> However, the Court has reinforced many times the State obligation to protect in cases such as *López Ostra v. Spain*, where it held that the State failed to succeed in striking a fair balance between the interest of the town's economic well-being in having a waste-treatment plant, and the applicant's effective enjoyment of her right to respect for her home and her private and family life.<sup>613</sup>

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<sup>608</sup> For instance, hearing related to Forced Displacement and Development in Colombia, 153 Period of Sessions, (Oct. 27, 2014); Extractive Industries and Human Rights of the Mapuche People in Chile, 154 Period of Sessions; Corporations, Human Rights, and Prior Consultation in the Americas, 154 Period of Sessions; Reports of Destruction of the Biocultural Heritage Due to the Construction of Mega Projects of Development in Mexico, 153 Period of Sessions; Impact of Canadian Mining Activities on Human Rights In Latin America, 153 Period of Sessions; Human Rights Situation of Persons Affected by the Extractive Industries in the Americas, 144 Period of Sessions.

<sup>609</sup> See, for instance, Inter-American Commission of Human Rights, Indigenous and Tribal Peoples' Rights over their Lands and Natural Resources, OEA/Ser.L/V/II. Doc. 56/09. (Dec. 30, 2009); or on Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco, OEA/Ser.L/V/II. Doc. 58. (Dec. 24, 2009).

<sup>610</sup> For example, when corporate activities affect the right to health of communities, indigenous sacred zones, or the right to prior consultation of indigenous peoples while implementing large-scale projects. See, e.g., San Mateo de Huanchor community and members, Peru, Precautionary Measures, Case 504/03, Inter-Am. Ct. H.R., Report No. 69/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (Aug. 17, 2004);

<sup>611</sup> A paradigmatic example of this approach can be found in the case of the Santo Domingo Massacre in which neither the IACHR nor the Court addressed the role of Occidental Petroleum Corporation (OXY) in Colombian Air Force bombing of the hamlet of Santo Domingo in the department of Arauca, Colombia. See *Santo Domingo Massacre v. Colombia*, Preliminary Objections, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 259 (Nov. 30, 2012).

<sup>612</sup> ECtHR, *Florin Mihăilescu v. Romania*. 26 August 2003, App. No. 47748/99. ECHR 2003-II

<sup>613</sup> ECtHR, *López Ostra v Spain* A 303-C (1994); 277.

Besides the particular barriers of some domestic law jurisdictions, there are also many general difficulties in interpreting and applying the UNGPs in practice, especially in relation to abuses taking place outside territorial boundaries. States tend to have different standards when assessing the legitimation of a particular case and whether it is appropriate to take jurisdiction over it, and whether or not there are indeed alternative sources for effective remedy. Some States have much more flexible rules on extraterritorial jurisdiction than others, which inevitably raises the question as to whether those with very restrictive rules are meeting their *duty to protect* under the Guiding Principles.<sup>614</sup> For many different reasons, victims often lack access to an effective remedy in their national court systems and they have increasingly sought remedies through litigation in foreign States – such as where the company is domiciled, the home States. However, jurisdiction is often denied in such cases, resulting in denials of justice and impunity for perpetrators or those complicit in human rights abuses.<sup>615</sup> Generally speaking, rules on the use of extraterritorial jurisdiction are more flexible in the private law sphere than in the public law sphere. This is mainly due to the fact that extraterritorial criminal law jurisdiction is constrained by rules of public international law designed to ensure respect for territorial sovereignty. Conversely, the private law sphere tends to be ruled by domestic law principles that usually take into account the possible factors that connect the claim and the forum State.<sup>616</sup>

On the other hand, international arbitration has increasingly proved to be an obstacle to seek redress for human rights violations. As is often the case, at international arbitration the company's rights under an agreement that it negotiated with a host government, or under an investment Treaty tend to prevail, which are pitted against a State's duty to protect the human rights of its citizens. In some cases arbitration is used to block judicial decisions.<sup>617</sup>

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<sup>614</sup> Zerk, J., *Corporate liability for gross human rights abuses, op. cit.*, p.59

<sup>615</sup> *Ibid.*

<sup>616</sup> According to Zerk, most States appear to consider that they have jurisdiction as of right over cases involving defendants incorporated under their own laws. However, in some common law States -such as the United States- the courts may choose not to exercise this jurisdiction if they consider that there exists another more "convenient" forum. This doctrine of *forum non conveniens* is not recognized in civil law States. Zerk, J., *Corporate liability for gross human rights abuses, op. cit.*, p.68.

<sup>617</sup> See for instance where Philip Morris initiated an arbitration Action against Uruguay. For more info: Corporate Legal Accountability, Business & Human Rights Resource Centre, Annual Briefing, June 2012, p.4. Available at <https://business-humanrights.org/sites/default/files/media/documents/corporate-legal-accountability-annual-briefing-final-20-jun-2012.pdf> accessed 20 April 2018.

Despite having great support, there are many critical voices to the UNGPs. The main arguments for this criticism is that the Ruggie framework sets a very low level of human rights obligations, as the achievement of consensus with business was a goal itself. Moreover, although the UNGPs place no limitations on the list of rights applicable to corporations, they do limit the respective corporate duties with respect to the Draft Norms.<sup>618</sup> Following the endorsement of the UNGPs, the Human Rights Council decided to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises<sup>619</sup> which consists of five independent experts, of balanced regional representation, for a period of three years.<sup>620</sup> Likewise, the Council decided to establish a Forum on Business and Human Rights under the guidance of the Working Group on the issue of human rights and transnational corporations and other business enterprises.<sup>621</sup>

In 2014, at the 26th session of the UN Human Rights Council in Geneva, a resolution ‘to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights’ was adopted.<sup>622</sup> The resolution was significantly supported by civil society organizations, and accepted in a highly divided vote.<sup>623</sup> The intergovernmental group met for the first time in Geneva in July 2015. The second session took place in October 2016, and the

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<sup>618</sup> Deva, S and Bilchitz, D., *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, *op. cit.*, p 51.

<sup>619</sup> Human Rights Council Resolution on Human rights and transnational corporations and other business enterprises, A/HRC/RES/17/4, 2011.

<sup>620</sup> The Working Group's mandate was renewed in June 2014. Website <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> accessed 21 April 2018.

<sup>621</sup> This Forum is open to all relevant stakeholder groups, including States, the wider United Nations system, intergovernmental and regional organisations, businesses, labour unions, national human rights institutions, non-governmental organizations, and affected stakeholders, among others.

<sup>622</sup> Drafted by Ecuador and South Africa, and signed also by Bolivia, Cuba and Venezuela. Resolution A/HRC/26/L.22/Rev.1.Full Document available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement> accessed 22 April 2018.

<sup>623</sup> The voting result was the following: 20 States in favour (Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russia, South Africa, Venezuela, Vietnam), 14 States against (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, South Korea, Romania, Macedonia, UK, USA) and 13 States abstaining (Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, UAE) (Business and Human Rights Resource Centre, ‘UN Human Rights Council 26th Session’, Geneva, 10-27 June 2014.

third one in October 2017. According to the OEIWG mandate, these sessions were ‘dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument’.<sup>624</sup> Some of the key points discussed include that a legally binding instrument should address gaps in voluntary initiatives and explore direct obligations on business.<sup>625</sup> Negotiations are currently ongoing and it seems that coming months are crucial for the success of the process.<sup>626</sup> Political confrontation between developed and developing States was evidenced from the first meeting,<sup>627</sup> mainly to the developing countries’ insistence on focusing exclusively on transnational corporations rather than all business enterprises –excluding then those operating at national level-,<sup>628</sup> as well as the requirement by the EU and other States to include a panel on the implementation of the UNGPs in the programme of work.<sup>629</sup> Moreover, one of the most important substantive issues raised was the hierarchy of international law, particularly focusing on the clash between international human rights regulation and bilateral investment agreements. Indeed, practice has shown how the latter has importantly limited host governments’ capacities to enact policies to address human rights public concerns.<sup>630</sup> Ultimately, whether a binding treaty on business and human rights is desirable and feasible remains an open question.<sup>631</sup>

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<sup>624</sup> UNHRC, ‘Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’, A/HRC/RES/26/9, 14 July 2014, para 2.

<sup>625</sup> Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (A/HRC/37/67), para. 53. The full report can be found at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/50/PDF/G1801750.pdf?OpenElement> accessed 22 April 2018.

<sup>626</sup> See for instance, ‘UN treaty process on business and human rights moving into a new phase’, *European Coalition for Corporate Justice*, 2 November 2017, Available at <http://corporatejustice.org/news/3607-un-treaty-process-on-business-and-human-rights-moving-into-a-new-phase> accessed 22 April 2018.

<sup>627</sup> Namely, the EU members and the United States and Canada did not attend the first session.

<sup>628</sup> This issue has been called the depth question. See Deva, S., ‘Scope of the Legally Binding Instrument to Address Human Rights Violations Related to Business Activities’, *A Working Paper of the ESCR-Net & FIDH Treaty Initiative*, 2017, p. 3.

<sup>629</sup> Cantú, H., ‘Negotiating A Treaty On Business And Human Rights: The Early Stages’, *UNSW Law Journal*, vol. 40, no. 3, 2017, pp. 1203.

<sup>630</sup> The theoretical discussion was eventually confronted by the reality that only State action to reform existing treaties or to include human rights concerns in new bilateral investment agreements could enhance the prospects for human rights protection by States. *Ibid.*, 1204.

<sup>631</sup> Cantú notes that civil society organisations and academics, as well as some States, are particularly keen to make the adoption of such a treaty. In contrast, businesses and many developed and developing States are unconvinced of the convenience of such an approach. For a further analysis of the position of Latin American States, as well as of other developing States regarding the treaty process, see Cantú Rivera, ‘Business and Human Rights in the Americas: Defining a Latin American Route to Corporate

### III.4. Intermediate conclusions

This chapter contended that corporate actors possess today unprecedented power and influence, affecting often negatively the human rights enjoyment of the communities where they operate. Therefore, holding companies accountable for such wrongdoings appears to be an urgent task for international lawyers. Given that States are the primary subjects of Public International Law, corporate involvement in human rights abuses is frequently categorised as complicity. This chapter analysed the notion of corporate complicity for human rights violations and the doctrinal categories, concluding that the concept is not legally clearly defined but widely used nowadays when referring to corporate human rights abuses.

Finally, this third chapter explored the options to hold corporations accountable for human rights abuses, focusing on requirements and practical obstacles to effectively develop them. It has been argued in this sense that, beyond the soft law initiatives that have proliferated in the last years, there is a lack of enforcement mechanisms at the international level for corporate human rights violations. At the domestic level, on the other hand, there is not uniformity concerning criminal law jurisdictions and private law mechanisms are not working well for victims either. Indeed, the lack of clear domestic standards and mechanisms to address corporate criminal liability can represent a State failure to properly comply with their duty to protect. Besides the procedural obstacles, victims of corporate human rights abuses face significant practical barriers when trying to obtain reparation, such as financial constraints.

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Responsibility' in Carrillo Santarelli, N. and Letnar, J. Černič (eds), *The Future of Business and Human Rights – Theoretical and Practical Considerations for a UN Treaty*, Intersentia, 2017, pp. 163-184.

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## IV. CHAPTER FOUR– Linking corporate accountability and transitional justice.

### IV.1 Introduction.

Corporations often develop their activities in territories affected by conflict or authoritarianism. However, human rights abuses in these contexts in which companies are involved in are not usually conceptualised as part of transitional justice programmes.<sup>632</sup> Instead, transitional justice has been traditionally focused only on State-sponsored violence, which helps to explain this accountability gap. Similarly, ESCRs violations have not historically received the attention of transitional justice strategies, as examined in chapter two. Given that economic actors, such as multinational corporations, gather more power and strength and the division between State and non-State actors under international law is eroded, transitional justice is being forced to address corporate-related human rights violations.<sup>633</sup> Furthermore, recognising the role of all actors and the whole spectrum of human rights violated in such contexts is crucial to properly address the root causes of violence and conflict, as well as to contribute to sustainable and positive peace.

The notion of positive peace implies more than the mere absence of violence; it also includes the restoration of relationships, the creation of social systems that cover the needs of the population and the constructive resolution of conflicts.<sup>634</sup> The primary goal for positive peace would be therefore to address deep-rooted causes of conflict, so conditions for violence would be resolved.<sup>635</sup> Similarly, transitional justice aims to

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<sup>632</sup> Michalowski, S., 'Introduction', in Michalowski, S. (ed.), *Corporate Accountability in the Context of Transitional Justice*, Routledge, 2013, p.1

<sup>633</sup> *Ibid.* p.2.

<sup>634</sup> Galtung differentiates between negative and positive peace, arguing that the first one simply refers to an absence of violence, as something negative/undesirable has stopped. He also states that peace theory is intimately connected not only with conflict theory, but equally with development theory. See Galtung, J., *Theories of Peace. A Synthetic Approach to Peace Thinking*, International Peace Research Institute, 1967, pp. 12-17; See also for a brief analysis Galtung, J., 'Violence, Peace, and Peace Research', in *Journal of Peace Research*, vol. 6, no. 3, 1969, pp. 167-191.

<sup>635</sup> See for instance, Sandole, D. J. D., 'Typology', in Cheldelin, S., Druckman, D. and Fast, L. (Eds.), *Conflict: From Analysis to Intervention*, Continuum, 2003, pp.39-45.

address the legacies of past violence and holding perpetrators accountable for human rights abuses, so transitional justice strategies definitely contribute to broader peacebuilding efforts in the aftermath of conflict or oppression.<sup>636</sup> Transitional justice strategies, as part of these peacebuilding efforts, should therefore address the root causes of conflict and repression. Adopting such a broad and holistic conception of transitional justice entails considering the role of all actors involved in conflict or repression, as well as all human rights violations committed. Therefore, linking transitional justice to corporate accountability could potentially enhance and strengthen both fields and the pathway to sustainable and positive peace.

In 2004, the UN Security Council was already discussing the role of business in conflict prevention, peacekeeping, post-conflict and peacebuilding.<sup>637</sup> The former Secretary General, Kofi Annan, noted then that while the economic dimension of armed conflict is often overlooked, it should never be underestimated. Similarly, he pointed out that ‘business itself has an enormous stake in the search for solutions’.<sup>638</sup> It is important thus to note that the economic dimension of transitional justice can be twofold: on the one hand, with regard to violations of socioeconomic rights under conflict or repression; on the other hand, regarding economic actors’, such as corporations’, involvement in human rights violations.

This chapter firstly explores considerations around the suitability of generally engaging corporations in peacebuilding efforts, as a broader field in which transitional justice initiatives can be framed. It also examines the challenges that considering corporations within transitional justice processes present to the international framework of business and human rights, particularly with regard to the UNGPs. While this soft law initiative does not provide for specific provisions concerning transitional justice processes, this chapter explores how the UNGPs can be applied to this sort of context.<sup>639</sup> Finally, the last section analyses how corporate accountability can be

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<sup>636</sup> Lekha Sriram, C., ‘Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice’, *Global Society*, vol. 21, no. 4, 2007, p. 579; See also Laplante, L. J., ‘Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework’, *International Journal of Transitional Justice*, vol. 2, issue 3, 2008, pp. 331–355.

<sup>637</sup> UN Security Council Press Release, Security Council Discusses the Role of Business in Conflict Prevention, Peacekeeping, Post-Conflict Peacebuilding, 2004.

<sup>638</sup> *Ibid.*

<sup>639</sup> Notably Principle 7, on ‘Supporting Business Respect For Human Rights In Conflict-Affected Areas’.

addressed in transitional justice processes within the existing mechanisms. Particular attention will be paid in this sense to ESCRs violations linked to corporate involvement.

#### **IV.2 Engaging corporations in peacebuilding contexts.**

While the term ‘peace-building’ emerged in the 1970s with the work of Johan Galtung, it was coined for the first time by the then-Secretary General of the UN, Boutros Boutros-Ghali, in 1992 in a report entitled *Agenda for Peace*.<sup>640</sup> Peacebuilding aims to promote sustainable peace by addressing the ‘root causes’ of violent conflict and supporting domestic capacities for peace management and conflict resolution. The field thus encompasses a wide range of measures and processes, ranging from the disarmament of ex-combatants to the rebuilding of political and social institutions, including thus transitional justice strategies and mechanisms. Transitional justice programmes are increasingly part of broader peacebuilding strategies in a way to achieve positive and sustainable peace.<sup>641</sup>

In 2000, the Report of the Panel on United Nations Peace Operations - also known as the *Brahimi Report* - defined peacebuilding as ‘activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war.’<sup>642</sup> Moreover, in 2007, the UN Secretary-General's Policy Committee set down the following conceptual basis for peacebuilding to inform UN practice:

‘Peacebuilding involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundations for sustainable peace and development. Peacebuilding strategies must be coherent and tailored to specific needs of the country concerned, based on national

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<sup>640</sup> The former Secretary General Boutros Boutros-Ghali, defined peacebuilding in 1992 as ‘measures aimed at individualising and strengthening structures that tend to reinforce and consolidate peace in order to prevent a resumption of the conflict’. An *Agenda for Peace* - A/47/277, S/24111. Available at <http://www.un-documents.net/a47-277.htm> accessed 20 April 2018.

<sup>641</sup> Lekha Sriram, C., ‘Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice’, *op. cit.*, p. 579

<sup>642</sup> UNSC, A/55/305-S/2000/809, 21 August 2000, p. 3. Available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/55/305](http://www.un.org/ga/search/view_doc.asp?symbol=A/55/305) accessed 23 April 2018.

ownership, and should comprise a carefully prioritized, sequenced, and therefore relatively narrow set of activities aimed at achieving the above objectives.’<sup>643</sup>

The private sector can potentially play an important role in peacebuilding contexts, as well as in the prevention of the recurrence of conflict. On the one hand, corporations can engage in the transitional justice process and State reconstruction after conflict or repression, which is a basis for peace. On the other hand, business operations can contribute to economic prosperity, generating employment and empowering people. Conflict sensitivity and ethical behavior should be expected under these circumstances which can, certainly, contribute significantly to broader peace efforts, ranging from conflict prevention to postconflict reconstruction, which presents its own set of singular challenges.<sup>644</sup> An extensive report on business-based peacebuilding was written in 2000 by Jane Nelson, entitled ‘The Business of Peace: The Private Sector as a Partner in Conflict Prevention and Resolution’.<sup>645</sup> According to Nelson, the willingness of companies to get involved in peacebuilding efforts should increase since

‘(...) recent developments in international humanitarian and human rights law have increased the risk of transboundary litigations for companies accused of human rights abuses and complicity in such abuses. At the same time the growth in the activities of non-governmental pressure groups, the international media and the internet, has increased the risk of reputation damage for companies accused of human rights abuses or complicity in conflict situations’.<sup>646</sup>

Therefore, demonstrating the costs of conflict to the private sector, and linking specific contexts with specific companies would be essential in order to get corporations

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<sup>643</sup> Decision of the Secretary-General’s Policy Committee, May 2007. See UN Peacebuilding: An Orientation., UN Peacebuilding Support Office, September 2010. Available at [http://www.un.org/en/peacebuilding/pbso/pdf/peacebuilding\\_orientation.pdf](http://www.un.org/en/peacebuilding/pbso/pdf/peacebuilding_orientation.pdf) accessed 23 April 2018.

<sup>644</sup> Forrer, J., Fort, T, and Gilpin, R., ‘How Business Can Foster Peace’, United States Institute of Peace, Special Report 315, 2012, p.10.

<sup>645</sup> Published by The Prince of Wales Business Leaders Forum, International Alert and the Council on Economic Priorities. Full document available at <http://www.international-alert.org/sites/default/files/publications/The%20Business%20of%20Peace.pdf> accessed 23 April 2018.

<sup>646</sup> *Ibid.* p.15.

involved in peace processes.<sup>647</sup> In this sense, several human rights organisations together with governments and companies have created partnerships to develop voluntary human rights initiatives, addressing particular problems related to corporate activities in conflict or weak governance zones. Among the first of these multi-stakeholder initiatives was the *Kimberley Process Certification Scheme or the Certification of Rough Diamonds*, to control the trade of diamonds and avoid the export of so-called ‘blood diamonds’.<sup>648</sup> While it has been a remarkable effort to address the intersection between conflict and trade in failed States, the *Kimberley Process* leaves participating nations independent to enact whatever legislation they deem necessary for enforcement of the scheme.<sup>649</sup> The Core document of the *Process* makes a series of recommendations, but still highlights the voluntary nature of the entire initiative.<sup>650</sup> Indeed, what the *Kimberley Process* ultimately aims at is to ‘establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory’,<sup>651</sup> but not to directly prevent conflict or corporate complicity in human rights abuses. Rather, it seeks to indirectly contribute to this goal by controlling the provenance of the diamonds.

Another similar initiative is the *Voluntary Principles on Human Rights and Security*, a voluntary code of conduct launched in 2000 that set rules for multinational oil, gas and mining corporations’ relations with a host country’s public security forces

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<sup>647</sup> Rettberg, A., ‘Business-led Peacebuilding in Colombia: Fad or Future of a country in crisis?’, *Crisis State Programme*, Working Paper no. 56, 2004, pp. 48–49. Available at <https://core.ac.uk/download/pdf/95920.pdf> accessed 23 April 2018.

<sup>648</sup> Website of the initiative available at <https://www.kimberleyprocess.com/> accessed 23 May 2018.

<sup>649</sup> Kimberley Process Core Document, 2003, Document available at <http://www.kimberleyprocess.com/en/kpcs-core-document> accessed 23 May 2018. Specifically, section 4 of the document contends that each participant should ‘as required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive proportional penalties for transgressions’.

<sup>650</sup> Recommendations generally provide examples of what participants are encouraged to do, such as ‘Participants that produce diamonds and that have rebel groups suspected of mining diamonds within their territories are encouraged to identify the areas of rebel diamond mining activity and provide this information to all other participants’. The language employed in the document refers to what participating countries ‘should’ do, rather than what they must do or what they are required to do. For a further analysis on this issue see Howard, A., ‘Blood Diamonds: The Successes and Failures of the Kimberley Process Certification Scheme in Angola, Sierra Leone and Zimbabwe’, *Washington University Global Studies Law Review*, vol. 15, issue 1, 2015, pp. 137–159.

<sup>651</sup> Kimberley Process Core Document, 2003, section III.f.

and with local and foreign private security contractors.<sup>652</sup> While the *Voluntary Principles* were not designed to induce regime change, NGOs and governments managed to introduce rules for extractive multinationals to control their conduct. Those rules are on security issues, a field highly confidential and hardly ever open to NGOs,<sup>653</sup> which makes the accomplishment even more significant.<sup>654</sup> Notably, the *Voluntary Principles* was one of the initiatives that later informed the development of the UNGPs. The initiative includes performance indicators, permanence requirements and reporting guidelines all meant to foster compliance with this code. Indeed, the code asks companies to conduct comprehensive security assessments to identify the risks that company security policies and host governments may pose to communities (section 1); to explicitly let host governments know that human rights violations are inadmissible and use their influence to make sure that those implicated in human rights abuses do not provide security services, as well as to support the strengthening of ‘State institutions to ensure accountability and respect for human rights’ (section 2); and to investigate and terminate their contracts where there is credible evidence of human rights violations, ‘unlawful or abusive behaviour’.<sup>655</sup> In summary, the code assigned extractives companies a new role of holding host governments and public and security forces accountable. Although both of the above-described initiatives are not purely peacebuilding efforts, they significantly contribute to avoid fueling conflict and human rights violations in conflict situations. In fact, the message intended to be conveyed seems to be that businesses can refrain from doing harm and, what is more, they can use their influence to avoid human rights abuses.

It is worth noting that the private sector involves different groups and businesses, which may have different concerns and priorities. While usually multinationals and larger companies have more resources, smaller companies may be even a better option to take part in peacebuilding initiatives. Indeed, most studies refer

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<sup>652</sup> Website available at: <http://www.voluntaryprinciples.org/> accessed 23 May 2018.

<sup>653</sup> With the exception of the International Committee for the Red Cross

<sup>654</sup> Guáqueta, A., ‘Harnessing corporations: lessons from the voluntary principles on security and human rights in Colombia and Indonesia’, *Journal of Asian Public Policy*, vol.6, no.2, 2013, p.133.

<sup>655</sup> Voluntary Principles on Security and Human Rights, document available at [http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary\\_principles\\_english.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf) accessed 23 May 2018.

to multinational companies rather than domestic or local businesses.<sup>656</sup> However, despite being underestimated in favor of multinationals, domestic business actors offer inherent advantages regarding conflict prevention and peacebuilding.<sup>657</sup> The Swedish Institute of International Affairs and Social Entrepreneurship Forum conducted a study in 2009 on the business sector's role in preventing conflicts and poverty in Sub-Saharan Africa, specifically focused on Kenya and Rwanda. The work concluded that businesses can be significantly helpful in conflict prevention, facilitating communication and creating interdependencies in society across the wide spectrum of potentially dividing elements, such as religion or ethnicity. Similarly, it contended that given that most people are employed by -or even running- local small businesses, those businesses serve as a good starting point for development of peacebuilding initiatives.<sup>658</sup> Besides the economic impulse that foreign investment can offer to peacebuilding contexts through businesses, companies can also help to prevent conflict by reducing tensions between communities and generating economic opportunities for marginalised groups.<sup>659</sup> Particularly, businesses' involvement in peacebuilding contexts can contribute to non-discrimination, training and mentoring to share competence, information and experience that would otherwise not be available.<sup>660</sup>

The role of companies in peacebuilding contexts has lately received considerable attention due to several factors. As noted before, corporations often develop their operations in high-risk areas under armed conflict or repression. Likewise, the private sector has the capacity to intervene in different and important ways in conflict resolution and country reconstruction. Ultimately, the wide global trend towards so-called 'privatization of peace', by which services and functions traditionally provided by the State or the international community are now provided by the private sector, has

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<sup>656</sup> Only a few studies have explored the potential role of local businesses in national and regional peace processes such as in Colombia and Sub-Saharan Africa.

<sup>657</sup> Given that, for instance, they are closer to the ground and population. See for instance, International Alert, 'Local Business, Local Peace: The Peacebuilding Potential of the Domestic Private Sector', *International Alert*, 2006.

<sup>658</sup> McNeil, H., Botha, Å., Küçükaslan, E. and Stenborg, E., 'Sustainable entrepreneurship in post-conflict areas – Learning journeys to Kenya and Rwanda'. *Stockholm: Swedish Institute of International Affairs and Social Entrepreneurship Forum*, 2010, p. 11.

<sup>659</sup> Evers, T., 'Doing Business and Making Peace?', Swedish Institute of International Affairs, Occasional UI papers, no.3, 2010, p.17.

<sup>660</sup> Fort, T. and Schipani, C., *The Role of Business in Fostering Peaceful Societies*, Cambridge University Press, 2004, pp. 153–166.

also increased the focus on corporations in peacebuilding contexts.<sup>661</sup> With the phenomenon of globalisation and the increasing complexity of the current political world, the private sector has progressively become involved in fields which were before exclusively reserved for States. While the role of companies for a long time has been limited to standard-setting for labour and other specific and technical areas, they are now increasingly participating in policy-making relating to human rights, corruption and conflict, just to mention some examples.<sup>662</sup> Consequently, the relevance of businesses as actors in conflict resolution and peacebuilding contexts has significantly increased.

In addition, it is widely accepted that successful peace negotiations and implementation of peace agreements often require private sector support. Evidence suggests that business can even undermine peace efforts if it is not properly drawn into a peace process, or when its interests are not taken into account.<sup>663</sup> Corporations' participation in peace processes can take many forms: from direct participation in negotiations, to indirect activities aimed at influencing negotiators, such as lobbying, shuttle diplomacy and participating in multi-sector dialogues.<sup>664</sup> Likewise, the belief that the end of the conflict and violence and prospects of future stability will offer economic opportunities is another important factor that drives the private sector participation in peace processes. Furthermore, business representatives become important stakeholders in the political sphere.

However, while there are well-known cases of the successful involvement of businesses in peace negotiations,<sup>665</sup> there are also other cases in which they have

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<sup>661</sup> In those contexts, States have frequently been described as 'fragile' or 'failed', being unwilling or unable to provide essential services and functions to their population and leaving the private sector, in many instances, to perform such roles. See Tripathi, S., and Gündüz, C., 'A role for the private sector in peace processes? Examples, and implications for third-party mediation', Centre for Humanitarian Dialogue, OSLO forum 2008 – The OSLO forum Network of Mediators, p.16. Document available at <https://osloforum.org/sites/default/files/Salil%20Tripathi%20Mediation%20Business%20WEB.pdf> accessed 26 April 2018.

<sup>662</sup> Evers, T., 'Doing Business and Making Peace?', *op. cit.*, p. 14.

<sup>663</sup> Tripathi, S., and Gündüz, C., 'A role for the private sector in peace processes? Examples, and implications for third-party mediation', *op. cit.*, p.17.

<sup>664</sup> *Ibid.*

<sup>665</sup> Such as South Africa and Ireland. See Iff, A., 'What guides businesses in transformations from war to peace?' in Pigrau, A & Prandi, M (eds.) *Companies in Conflict Situations*, International Catalan Institute for Peace, 2013, pp. 153-178.



failed.<sup>666</sup> The case of El Salvador, for instance, is a good example of how business became a key actor to facilitate the ending of a conflict. After over a decade of civil war, some leaders of the Salvadoran business community realised that they were missing out on substantial opportunities within the framework of growing competition. Consequently, this new generation of business leaders started to develop initiatives linking their economic prosperity to peace. Questioning the ideological background of the conflict, their involvement in the peace process was essential, resulting in the signing of a peace agreement in January 1992.<sup>667</sup> While the group did not represent a consensus view among Salvadoran business, the strength of their economic interests and their strategic access to the decision-making process, including the president himself, were key factors to be considered in supporting and directing the negotiation process.<sup>668</sup>

On the contrary, however, some recent experiences, such as those of Sri Lanka and Colombia, show that corporations only take part in the peace process when direct costs of conflict rise to a level that can no longer be sustained, and always in their own interest.<sup>669</sup> In Colombia, for instance, involving business in the peace process still presents major challenges, as human rights violations related to economic interests are still today very frequent.<sup>670</sup> Socially relevant reforms have been largely neglected during the peace process, with the only exception being land rights. Similarly, crimes that served the interest of business still today enjoy impunity.<sup>671</sup>

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<sup>666</sup> Such as Sri Lanka and Nepal. Iff argues that businesses want to make money and as such, they have close ties to government, so it is questionable in her view whether they are the most suitable agents to engage in peace building processes. *Ibid.*

<sup>667</sup> Rettberg, A., 'Managing Peace: Private Sector and Peace Processes in El Salvador, Guatemala, and Colombia'. *ReVista (Harvard Review of Latin America)*, David Rockefeller Center for Latin American Studies, Harvard University, 2003, pp. 66-68.

<sup>668</sup> Rettberg, A., 'The Business of Peace in Colombia: Assessing the Role of the Business Community in the Colombian Peace Process', *Latin American Studies Association*, Dallas, Texas, USA, March 27 – 29, 2003, p.2.

<sup>669</sup> Tripathi, S., and Gündüz, C., 'A role for the private sector in peace processes? Examples, and implications for third-party mediation', *op cit.*, p.24

<sup>670</sup> More than 100 human rights defenders were killed in Colombia in 2017, according to the United Nations. See 'More than 100 human rights activists killed in Colombia in 2017, UN says', *The Guardian*, 21 December 2017, Available at <https://www.theguardian.com/world/2017/dec/20/more-than-100-human-rights-activists-killed-in-colombia-in-2017-un-says> accessed 26 April 2018.

<sup>671</sup> Suhner, S., 'Business, human rights, and the peace process in Colombia', *Colombia- Challenges ahead, À propos, The Koff Peacebuilding Magazine*, no.149, 2016, p. 14.

Notwithstanding the above-mentioned positive role that companies can play in peacebuilding and peace negotiations, this should be approached cautiously, as their intervention can even be counterproductive when they act only out of self-interest. This is particularly important in conflicts where economic factors predominate, and where changing the former power structure is a matter high on the agenda, such as happened in Colombia. The assessment of the economic legacy of conflict or repression will certainly influence the chances of establishing a stable peace afterwards.<sup>672</sup> Business' close involvement in the peacebuilding initiatives could skew the outcome to favour an economic model that the business community prefers, but which may not have consensus support across the society.<sup>673</sup>

Be that as it may, it seems to be undeniable that while corporations are not the sole agents of change, they can be strategic partners in peacebuilding contexts. In many cases, business intervention can offer added value through their resources and good offices. Furthermore, there are multiple ways in which the private sector can engage in peacebuilding processes. Although lessons can be drawn from previous experiences, each specific context and circumstances will require different ways of engagement of the private sector, just as transitional justice processes are always context-specific.

### **IV.3 Challenges for the international framework of business and human rights in transitional justice contexts.**

The endorsement of the UNGPs framework in 2011 has been just one step further in the road to providing some protection to victims of corporate abuses. However, while the most egregious corporate human rights violations occur in conflict-affected or high-risk areas, the UNGPs provide no further guidance to companies operating in such environments, only to States.<sup>674</sup> Since 'the risk of gross human rights

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<sup>672</sup> As Hecht and Michalowski have noted, economic stability might play an important role for the success of transitional justice. Hecht, L. and Michalowski, S., 'The Economic and Social Dimensions of Transitional Justice', *op. cit.*, p. 4.

<sup>673</sup> Tripathi, S., and Gündüz, C., 'A role for the private sector in peace processes? Examples, and implications for third-party mediation', *op. cit.*, p. 25.

<sup>674</sup> Such as the need to protect company employees. See SRSG Report 2008, n.27, para.63 and UNGPs, principle 7. See for instance, UN Human Rights Council, Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and human

abuses is heightened in conflict affected areas’, the UNGPs recommend that States take additional steps to ‘ensure that business enterprises operating in those contexts are not involved with such abuses’.<sup>675</sup> In fact, the UNGPs recognise that corporations are more likely to violate human rights in those high-risk situations, although they do not specifically refer to transitional justice processes. The UNGPs therefore provide a window of opportunity for linking corporate accountability with transitional justice.<sup>676</sup>

Principle number 7 is expressly dedicated to ‘conflict-affected areas’. The terminology employed by the SRSG reflects the intention to expand the coverage of Principle 7 beyond the traditional notion of armed conflict under IHL.<sup>677</sup> In fact, human rights violations do occur in conflicts but also under repressive States, or low and localized conflicts in which the State may have not lost part of the territory.<sup>678</sup> While there are some divergent interpretations about the applicability of Principle 7,<sup>679</sup> Mares argues that this provision is fundamentally about ‘gross abuses’, whereby ‘conflict-affected areas’ are one setting used for powerful exemplification.<sup>680</sup> This broad interpretation of ‘conflict-affected areas’ in which different types of conflict and authoritarian regimes are included would consequently require appropriate home State

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rights in conflict-affected regions: Challenges and options towards State responses, A/HRC/17/32, 27 May 2011

<sup>675</sup> Guiding Principle 7, ‘Supporting business respect for human rights in conflict-affected areas’.

<sup>676</sup> Sandoval, C., Filipini, L., Vidal, R., ‘Linking Transitional Justice and Corporate Accountability’, *op. cit.*, p. 25.

<sup>677</sup> Mares notes that although utmost precision is not indispensable for grasping Principle 7, the question of what types of conflicts are left out by the Principle remains. Mares, R., ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *op. cit.*, 2014, p. 298.

<sup>678</sup> As the OHCHR noted, ‘the greatest risks [of involvement in gross human rights abuses] arise in conflict-affected areas, though they are not limited to such regions’. Office of the High Commissioner for Human Rights, *The Corporate Responsibility To Respect Human Rights – An Interpretive Guide*, HR/PUB/12/02, 2012, p.80

<sup>679</sup> Some as Kyriakakis see Principle 7 as applying narrowly to conflict contexts where the State lost effective control. See for instance, Kyriakakis, J., ‘Developments in international criminal law and the case of business involvement in international crimes’, Humanitarian debate: Law, policy, action – Business, violence and conflict, *International Review of the Red Cross*, vol. 94, 2012, p.987. By contrast, others deem Principle 7 to cover authoritarian regimes or mainly some type of conflicts (‘armed conflict’). In this sense, the ICAR report understands Principle 7 in an overtly narrow and extensive fashion simultaneously. While considering a priority for future State action to deal with the ‘violent conflict abroad’ where companies are ‘caught up in war and dictatorship’, it also understands Principle 7 to be about ‘zones of *armed conflict*’ and ‘a particular context of violent conflict’. Taylor, M.B., *Human Rights Due Diligence: The Role of States*, Progress Report, ICAR, 2013. Document available at <http://bhrinlaw.org/icar-human-rights-due-diligence-2013-update-final.pdf> accessed 18 April 2018.

<sup>680</sup> Mares, R., ‘Corporate and State Responsibilities in Conflict-Affected Areas’, *op. cit.*, p.307.

action.<sup>681</sup> The explanatory commentary of Principle 7 notes that in these contexts, ‘the host State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their home States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuses’.<sup>682</sup>

The UNGPs avoided defining any specific human rights responsibilities for companies operating in the above-mentioned circumstances.<sup>683</sup> Rather, they established responsibilities to be deduced on a case-by-case basis. Thus, unless States take regulatory measures requiring companies to conduct human rights *due diligence*, this approach allows each stakeholder to define for itself what the scope of the corporate responsibility to respect is.<sup>684</sup> However, although the notion of *due diligence* could be a laudable goal,<sup>685</sup> it lacks a uniform content in international law. Likewise, it involves some difficulties when trying to carry out consultation with affected groups and relevant stakeholders in conflict and transitional justice contexts, where stakeholders cannot be expected to form a homogenous group.<sup>686</sup>

Similarly, legal boundaries of corporate complicity are not clearly defined, as explored in the previous chapter.<sup>687</sup> However, with regard to serious violations of human rights and grave breaches of humanitarian law, there are legal standards that guide both States and companies in conflict-affected or high-risk areas. They constitute a relevant tool for the purposes of transitional justice processes, such as ending impunity, knowing the truth about past events and ensuring reparations and institutional

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<sup>681</sup> *Ibid.* Mares also suggested that during the mandate of the former SRSG, John Ruggie, conflict areas occupied a high thematic priority that has not been observable anymore in the post-UNGPs period. In his view, the discussion around this provision revolved around the transnational dimension revealing the responsibilities of multinational companies and home States.

<sup>682</sup> Guiding Principle 7, Commentary.

<sup>683</sup> Based on the Statement that ‘business can affect virtually all internationally recognised rights’. See SRSG Report 2008, n.27, para.58.

<sup>684</sup> Which also leaves undetermined the notion of due diligence Paul, G. and Schönsteiner, J., ‘Transitional Justice and the UN Guiding Principles on Business and Human Rights’, *op. cit.*, p.81.

<sup>685</sup> Defined as ‘the steps a company must take to become aware of, prevent and address adverse human rights impacts’. SRSG Report 2008, n.27, para.56.

<sup>686</sup> The concept entails an ‘obligation of conduct’ but not an ‘obligation of result’. See Paul, G. and Schönsteiner, J., ‘Transitional Justice and the UN Guiding Principles on Business and Human Rights’, in Michalowski, S., *Corporate Accountability in the Context of Transitional Justice*, *op. cit.*, p.80.

<sup>687</sup> See Section II, Chapter III.

change.<sup>688</sup> Nevertheless, practical problems with collecting and presenting evidence in court, as well as establishing connections between the corporations and the events,, and between parent corporations and their subsidiaries are still significant procedural hurdles.<sup>689</sup>

Principle 7 also carries some policy recommendations with regard to the future evolution of the business and human rights regime. Particularly with regard to gross abuses, the former SRSG refers to the significant developments made in the field of international criminal law, including the establishment of the International Criminal Court (ICC). While the ICC does not have jurisdiction over companies, the former SRSG drew attention to the ‘expanding web of potential corporate legal liability’, where international crimes are enforced through national legal systems.<sup>690</sup> With regard to conflict-affected zones, Principle 7 highlights the host State’s incapacity to perform its duty to protect. Accordingly, and bearing in mind that devastating effects of violence cannot be properly covered by International Humanitarian Law<sup>691</sup> and International Criminal Law,<sup>692</sup> Principle 7 proposed an exceptional responsibility to act of home States and a new international legal instrument.<sup>693</sup> Indeed, home and host States should not feel released from the obligation to adequately regulate corporate activities simply because the UNGPs contain provisions that encourage companies to duly develop their operations. In this sense, corporations alleged to be involved in human rights abuses might enjoy impunity during the transition, taking advantage of their economic power and influence. Those particular conditions, as seen before, usually hamper the accountability process. This not only happens because of the weakness in the justice system, but also due to the fact that authorities may also be unwilling to do so because of their own involvement in human rights violations, or because they profit from business activities and seek to create a conducive environment that attracts businesses.<sup>694</sup>

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<sup>688</sup> De Greiff, P., ‘Introduction’, in De Greiff, P., *Handbook of Reparations*, Oxford University Press, 2006, p.11.

<sup>689</sup> Zerk, J., *Corporate liability for gross human rights abuses*, *op. cit.*, p. 101.

<sup>690</sup> Commentary to the Principle 23.

<sup>691</sup> IHL is limited to armed conflicts.

<sup>692</sup> ICL is limited to the most egregious human rights violations.

<sup>693</sup> Precisely, the former SRSG was criticized for not going the ‘treaty road’ during his mandate.

<sup>694</sup> Kyriakakis, J., ‘Developments in international criminal law and the case of business involvement in international crimes’, *International Review of the Red Cross*, vol. 94, no. 887, 2012, p. 983.

It is important to note that the UNGPs do not exclude *due diligence* regarding past human rights abuses,<sup>695</sup> in contrast to the general principle of non-retroactivity in international law. As pointed out by Paul and Schönsteiner, this is quite relevant from a transitional justice perspective.<sup>696</sup> Indeed, although the principles refer to ‘actual and potential human rights impact’,<sup>697</sup> the subsequent commentaries explain that ‘those that have already occurred should be subject for remediation’.<sup>698</sup> The former SRSG also stated that ‘human rights risks may be inherited through mergers or acquisitions’,<sup>699</sup> which is particularly relevant in transitional justice contexts where there are often changes of ownership. However, it is left to business, States and other actors involved deciding which concrete obligations exist with respect to past violations.<sup>700</sup> It should be also highlighted that the UNGPs fail to recognise the important fact that corporate-related abuses in ‘conflict-affected areas’ have gone largely unpunished. According to Paul and Schönsteiner, the UNGPs could have elaborated further on measures that both home and host States need to take to overcome obstacles faced by victims when trying to obtain reparations via judicial proceedings. Similarly, they argue that the UNGPs could have established companies’ responsibilities not to unduly interfere or undermine those proceedings as part of their obligation to respect.<sup>701</sup> Furthermore, the UNGPs do not provide guidance to either States or companies about how to ensure victims’ access to effective remedies and reparations. Likewise, there is also little guidance with regard to how States can regulate corporate activities to avoid and prevent human rights abuses.<sup>702</sup> In addition, with regard to the issue of reparations, the UNGPs remain weak in cases where the company is not responsible under domestic law. In fact, the UNGPs leave it to the company to decide whether or not it will play a role in providing for remediation in those cases.<sup>703</sup> Ultimately, as companies are called on to prevent human rights abuses through due diligence mechanisms and risk evaluation reports, they should

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<sup>695</sup> Referring to those violations which have already occurred.

<sup>696</sup> Paul, G. and Schönsteiner, J., ‘Transitional Justice and the UN Guiding Principles on Business and Human Rights’, *op. cit.*, p.88.

<sup>697</sup> See for instance Principle 17 and 24.

<sup>698</sup> See Principles 17 and 19.

<sup>699</sup> Principle 17 and commentary

<sup>700</sup> Paul, G. and Schönsteiner, J., ‘Transitional Justice and the UN Guiding Principles on Business and Human Rights’, *op. cit.*, p. 88.

<sup>701</sup> *Ibid.* p. 89.

<sup>702</sup> *Ibid.* p.92.

<sup>703</sup> When no legal responsibility has been determined but there are some kind of corporate responsibility for the harm. Principle 1 and commentary to Principle 22.

equally be especially aware of specific risks of transitional justice contexts. Thus, they should consider carefully how to deal with political corruption, how they employ and relate to private security guards and armed forces, how they affect the land rights of previously displaced individuals or communities and so forth.<sup>704</sup>

On the other hand, the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol) in 2008, which creates an international complaint mechanism for alleged violations of the International Covenant on Economic, Social and Cultural Rights (ICESCR), could provide great opportunities to address corporate ESCRs abuses. While it is clear that corporations cannot be held directly accountable under the Optional Protocol - only States can - it could still play an important role when approaching corporate accountability.<sup>705</sup> However, so far no academic reflection on how the Optional Protocol can be used to hold corporations accountable has been undertaken, except for an article by Aubry in 2013.<sup>706</sup> Aubry points out that since companies do not have direct obligations under the ICESCR, business responsibilities will have to be addressed indirectly through States' obligations. Similarly, Aubry states that while there are a number of technical difficulties in using the Optional Protocol in the particular framework of transitional justice,<sup>707</sup> if employed strategically, it could have a crucial impact in those contexts.<sup>708</sup>

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<sup>704</sup> Paul, G. and Schönsteiner, J., 'Transitional Justice and the UN Guiding Principles on Business and Human Rights', *op. cit.*, p. 88.

<sup>705</sup> For instance, Beth Simmons argued that within the sphere of the Optional Protocol, 'we are not in the world of litigation, but instead in the world of communication and persuasion'. Simmons, B.A., 'Should States Ratify? Process and Consequences of the Optional Protocol to the ICESCR', *Nordic Journal of Human Rights*, vol.27, 2009, p.71.

<sup>706</sup> The only reference we have to date is Sylvain Aubry's chapter 'A New Avenue towards Corporate Accountability. The Optional Protocol to the Covenant on Economic, Social and Cultural Rights', in Michalowski, S., *Corporate Accountability in the Context of Transitional Justice*, *op. cit.*, pp. 131-150.

<sup>707</sup> Aubry notes, for instance, situations in which the company caused the harm before the Optional Protocol came into force in the State in which the case is brought. He argues that this is quite common in the context of transition where authoritarian regimes are often reluctant to commit to human rights but new governments ratify international instruments. While Protocol cannot be used in those cases, Aubry points out that there may be exception according to the doctrine of 'continuing violation' For further information about it see Aubry, S., 'A New Avenue towards Corporate Accountability. The Optional Protocol to the Covenant on Economic, Social and Cultural Rights', *op. cit.*, p. 145.

<sup>708</sup> *Ibid.* p. 150.

A future international law scenario might include the adoption of a binding treaty on business and human rights.<sup>709</sup> However, as revealed by the current debates, some countries and specific stakeholders oppose the adoption of a hard law instrument. There is still no consensus on whether corporations should have direct international human rights obligations, comparable to those of States, and as mentioned earlier, the scope limitation to transnational corporations' activities has been also criticised quite a bit.<sup>710</sup> Similarly, in the deliberation and proposals on the content and nature of a future international treaty on business and human rights, little attention has been paid to corporate involvement in human rights abuses during dictatorships and armed conflict.<sup>711</sup> Transitional justice, thus, has not been to date a relevant issue within the discussions.<sup>712</sup>

#### **IV.4 Addressing corporate accountability and ESCRs in transitional justice processes.**

While corporations often develop their operations in territories affected by conflict or repression, the abuses in which companies are involved are usually not

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<sup>709</sup> And maybe even a World Court of Human Rights, whose Consolidate Draft Statute envisaged direct corporate accountability in its article 4 (defining corporations and other non-State actors as 'entities') Document available at <https://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf> accessed 23 April 2018.

<sup>710</sup> See chapter III, section 3.C. A. Indeed, National corporations have been the protagonist of human rights abuse in transitional justice contexts. See A. Payne, L., Pereira, G., Doz Costa, J., Bernal-Bermúdez, L., 'Can a Treaty on Business and Human Rights help Achieve Transitional Justice Goals?', *Homa Publica: International Journal on Human Rights and Business*, 2017, vol.1, no.2, pp.113.

<sup>711</sup> Business implications in transitional justice processes received some attention only in the second session of the Working Group, which took place in October 2016. Alfred de Zayas, UN Independent Expert on the Promotion of a Democratic and Equitable International Order, addressed the need for the new treaty to regulate business behavior in the context of conflict and authoritarian regimes. In addition, organisations like ANDHES, CELS and Dejusticia contributed to the discussion. Those written contributions are available at <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/WrittenContributions.aspx> accessed 23 April 2018.

<sup>712</sup> Ecuador distributed in the last session their proposal on the scope and obligations that should be included in a treaty. The document, 'Elementos para el proyecto de instrumento internacional jurídicamente vinculante sobre empresas transnacionales y otras empresas con respecto a los derechos humanos', does not contain any specific reference to transitional justice contexts. Document available in Spanish at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs\\_OBEs\\_SP.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs_SP.pdf) accessed 23 April 2018.



conceptualised as part of transitional justice.<sup>713</sup> Rather, transitional justice strategies have been traditionally focused on State-sponsored violence. In fact, accountability for corporate involvement in human rights abuses committed under authoritarianism and conflict has been referred to as the ‘missing piece of the puzzle, to pursue the full spectrum of justice and remedy for authoritarian and civil conflict periods’.<sup>714</sup> In addition, as Roht-Arriaza notes, limitations imposed by a focus on prosecutions within transitional justice processes can also explain why transitional justice has not been traditionally focused on economic actors, given that criminal prosecutions do not deal well with shades of culpability that could appear in different ways, such as passive acquiescence, moral complicity, or acceptance of benefit.<sup>715</sup> Nevertheless, it has been now evidenced that States are no longer the only actors involved in human rights violations, particularly in conflict-affected areas and countries under repression. However, abuses in which companies are involved have frequently enjoyed impunity.<sup>716</sup>

For its part, the general notion of ESCRs covers a wide spectrum of human rights, including some of the most fundamental and basic rights that have a clear connection to business. Indeed, labour rights are probably the most connected to business and the most likely to be abused by corporations. Discrimination in the workplace, forced labour or non-compliance with minimum labour conditions are some of the most representative examples of that. Although the impact of corporations on human rights has mainly been dealt with within the framework of CPRs, such as the right to be free from arbitrary killings or torture, businesses may equally be involved in violations of the full range of ESCRs, particularly in the context of labour-related rights,

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<sup>713</sup> Michalowski, S., ‘Introduction’, in Michalowski, S. (ed.), *Corporate Accountability in the Context of Transitional Justice*, Routledge, 2013, p.1

<sup>714</sup> Bohoslavsky and Ogenhaffen 2010:160

<sup>715</sup> Roht- Arriaza, N., ‘Why Was the Economic Dimension Missing for So Long in Transitional Justice? An Exploratory Essay’, in Verbitsky, H. and Bohoslavsky, J.P (Eds), *The Economic Accomplices to the Argentine Dictatorship. Outstanding Debts, op. cit.*, p.23.

<sup>716</sup> It is worth noting that there is a ‘Corporate Accountability and Transitional Justice database’ which is the result of a joint project between academics and practitioners from the University of Oxford, the University of Minnesota, ANDHES and CELS in Argentina and Dejusticia in Colombia, who have collaborated to identify and code cases of corporate involvement in human rights abuses during dictatorships and armed conflicts. The project aims to track judicial and non-judicial responses to this corporate involvement in past events. Further information on this project can be found at A. Payne, L., Pereira, G., Doz Costa, J., Bernal-Bermúdez, L., ‘Can a Treaty on Business and Human Rights help Achieve Transitional Justice Goals?’, *op. cit.*

such as the right to work and to unionise.<sup>717</sup> At the same time, corporations do have an important role to play within the progressive realisation of those rights under transition.<sup>718</sup>

As examined in chapter one, four processes constitute the core of transitional justice: the *truth process*, in which mechanisms such as TRCs are investigating and collecting information about past violent events and mass atrocities; the *justice process*, in which perpetrators of human rights violations should be brought to justice, usually through criminal proceedings but private claims can be also used; a *reparation process*, to redress victims of atrocities through economic and symbolic reparations; and an *institutional reform process*, to ensure that such atrocities will not happen again.

Within the truth process, TRCs are one specific mechanism that can be suitable to address corporate-related human rights violations.<sup>719</sup> Indeed, TRCs have been the main transitional justice instrument used to consider these issues, given that they are able to create a historical account of the past, the root causes of the conflict or repression, the violations and who took part in those past events. In this sense, the role of corporations was object of a special hearing on business and labour held by the South African TRC. The South African TRC in fact considered that ‘business was central to the economy that sustained the South African State during the Apartheid years’.<sup>720</sup> The Liberian Truth and Reconciliation Commission also dealt with the role of corporations during conflict and it particularly focused on economic crimes and violations of human

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<sup>717</sup> See for instance, Nolan, A., ‘Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A comparison of Regional Approaches to the Obligation to Protect’, 9 *Human Rights Law Review*, vol. 225, 2009, p.253.

<sup>718</sup> Also regarding non transitional situations. See for instance, Aguirre, D., ‘Multinational Corporations and the realisation of economic, social and cultural rights’, *California Western International Law Journal*, vol. 35, no.1, 2004, pp.60-63.

<sup>719</sup> See for instance Sandoval, C., Filipini, L., Vidal, R., ‘Linking Transitional Justice and Corporate Accountability’, *op. cit.*, or Koska, G., ‘Corporate accountability in times of transition: the role of restorative justice in the South African Truth and Reconciliation Commission’, *op. cit.*, pp. 41-67.

<sup>720</sup> South African Truth and Reconciliation Commission, Final Report, Preliminary Findings and Determinations, 2009, vol. 1, pp.2-3. The TRCs report concluded that corporations should contribute to the payment of reparations for victims, recommending different ways in which they could do it: a wealth tax, a one-off levy on corporate and private income, a one-off donation of 1 per cent of market capitalisation by companies listed in the Johannesburg Stock Exchange, a retrospective surcharge on corporate profits backdated to an agreed time, and responsibility for the payment of the previous government's debt. South African TRC report, n.36, Volumen 5, Chapter 8, 1998, p.318.

rights law in which they were involved.<sup>721</sup> This has been a good example of how TRCs could address the role of business during the conflict. It was revealed that the government at that time granted timber concessions to increase political strongholds and patronage for their own benefit<sup>722</sup> and in exchange for arms.<sup>723</sup> In fact, the president of one of these companies, Oriental Timber Corporation, was convicted in 2006 by Dutch authorities, for his involvement in illegal arms deals and for war crimes.<sup>724</sup> Furthermore, corporate complicity during the Liberian five-year civil war also contributed to the violation of the ESRCs. Populations were forcibly removed from their land, violating their right to an adequate standard of living, including right to adequate housing, amongst others.<sup>725</sup> The Liberian TRC also described corporate tax evasion as widespread and systematic.<sup>726</sup>

However, the potential attention that TRCs are able to dedicate to corporations has not always been translated into practice, or at least not as successfully as expected. Regarding the South African example, it is commonly accepted that it failed to deliver justice for corporate human rights abuses, as well as with regard to ESCRs violations.<sup>727</sup> TRCs are politically and economically weak institutions whose human resources and expertise are often limited, with their expertise linked to violations of certain CPRs for which the State is responsible.<sup>728</sup> In this respect, Koska points out that if choosing to

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<sup>721</sup> Republic of Liberia Truth and Reconciliation Commission, Volume Three, Appendices, Title III: Economic crimes and the conflict, exploitation and abuse.

<sup>722</sup> Woods, J, G. Blundell, G.A., and Simpson, R, 'Investment in the Liberian Forest Sector: A Roadmap to Legal Forest Operations in Liberia 1', *Forest Trends*, 2008.

<sup>723</sup> Altman, S. L., Nichols, S. and Woods, J.T., 'Leveraging High-Value Natural Resources to Restore the Rule of Law: The Role of the Liberia Forest Initiative in Liberia's Transition to Stability', in Lujala, P. and Rustad, S.A, *High-Value Natural Resources and Peacebuilding*, Earthscan, 2012, pp.337-340.

<sup>724</sup> Press Release, Global Witness, Arms dealer and timber trader Guus Kouwenhoven found guilty of breaking a UN arms embargo, June, 2006, available at <https://www.globalwitness.org/en/archive/arms-dealer-and-timber-trader-guus-kouwenhoven-found-guilty-breaking-un-arms-embargo/>. accessed 28 April 2018. More recently, Press Release, The Guardian, Dutch arms trafficker to Liberia given war crimes conviction, April 2017, available at <https://www.theguardian.com/law/2017/apr/22/dutch-arms-trafficker-to-liberia-guus-kouwenhoven-given-war-crimes-conviction> accessed 28 April 2018.

<sup>725</sup> Republic of Liberia Truth and Reconciliation Commission, Consolidated Final Report, pp.289–290.

<sup>726</sup> *Ibid.* p. 290.

<sup>727</sup> While the TRC made important recommendations on reparations of corporations, they were not fully implemented. In addition, within the scope of its mandate, the TRC in South Africa could have formally investigated allegations of labour violations. See for instance Koska, G., 'Corporate accountability in times of transition: the role of restorative justice in the South African Truth and Reconciliation Commission', *op. cit.*, pp.43 and 50.

<sup>728</sup> OHCHR, *Rule of Law Tools for Post-Conflict States: Truth Commissions*, HR/PUB/06/1, 2006, pp.9, 13 and 24.

engage with TRCs to address corporate crimes would mean that prosecutions are evaded and reparations denied, then restorative justice cannot be relied upon to provide corporate accountability.<sup>729</sup> Therefore, addressing the role of corporations for past abuses within TRCs mandates should not exclude the use of other transitional justice mechanisms to address corporate accountability, such as potential prosecutions and victims' rights to reparations. In this sense, alternative or complementary remediation mechanisms might be particularly welcome since access to effective remedies in post-conflict and post-dictatorship situations is considered crucial to ensuring peaceful transitions and stability.

Concerning the justice process, holding corporations to account is a complex issue, as examined in chapter three. International law suggests that corporations must not be held criminally liable when involved in gross human rights abuses.<sup>730</sup> Some commentators also argue that this kind of prosecutions could be an obstacle to peace and reconciliation in the aftermath of conflict or repression.<sup>731</sup> However, although corporations are not criminally liable before the ICC and in many domestic jurisdictions, individuals working for corporations could be prosecuted, tried and punished when involved in past human rights abuses. But this solution has not been always satisfactory as was examined in the previous chapter.<sup>732</sup> In fact, criminal law's focus has been on people who gave the orders and who acted on them, and consequently, attention to broader patterns of complicity was abandoned.<sup>733</sup> In any case, conducting prosecutions directly against corporations would be a key issue to dismantling the economic structures that made past human rights abuses possible and

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<sup>729</sup> Koska, G., 'Corporate accountability in times of transition: the role of restorative justice in the South African Truth and Reconciliation Commission', *op. cit.*, p.62.

<sup>730</sup> Evidence of that could be the exclusion of corporations from the jurisdiction of the International Criminal Court. Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July 2002)

<sup>731</sup> Supporters of this view have often claimed that the international law paradigm is not applicable in the transitional context due to the exceptional circumstances faced by States. See for instance, Sandoval, C., Filipini, L., Vidal, R., 'Linking Transitional Justice and Corporate Accountability', *op. cit.*, p.15; Mallinder, L. *Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Hart Publishing, 2008.

<sup>732</sup> See section one of the chapter III. In addition, legal action is usually expensive and time consuming, and it does not provide adequate and effective reparations for victims.

<sup>733</sup> Fletcher, L. and Weinstein, H., 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', *Human Rights Quarterly*, vol.24, 2002, p. 573.

preventing such situations from recurring in the future.<sup>734</sup> Similarly, civil liability could be also a useful and complementary mechanism in this regard. Domestic and international courts could order corporations to pay compensation for their abuses or even support the reaching of settlements related to abuses committed under conflict or repression. This happened in the case of *Doe v. Unocal*, where the parties reached an out-of-court settlement in which the company agreed to provide funds for programs in Myanmar to contribute to the improvement of victims' living conditions.<sup>735</sup>

On the other hand, corporations can also play a key role in the reparation process. Businesses are the economic driving force of societies, so they could assist the country's reconstruction by contributing, for instance, with economic reparations. Some commentators have noted that reparations provided by corporations should not be limited to traditional economic compensation.<sup>736</sup> Rather, they should include expropriation, providing restitution of land, terminating contracts, forbidding companies' participation in new biddings, and so forth. Indeed, satisfaction can also be provided by business in the form of a public apology, as well as contributing to build memory monuments.<sup>737</sup> Corporations will be consequently discouraged from being involved in human rights or humanitarian law violations. However, such kinds of extended reparations are only legally enforceable when the corporation's criminal or civil responsibility is firstly established, acknowledging their involvement in wrongful acts.<sup>738</sup>

Relevant discussion has been also generated with regard to the transformative potential of reparations. As victims of gross human rights violations in conflict or repression are often poor and marginalised, reparation could be conceived as a means to

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<sup>734</sup> Kremnitzer, M., 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law', *Journal of International Criminal Justice*, vol.8, 2010, p. 912.

<sup>735</sup> The settlement was finalized in March 2005, the federal appeal was withdrawn and the State cases were voluntarily dismissed. For further information see, Chambers, R., 'The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses', *Human Rights Brief*, vol. 13, 2005.

<sup>736</sup> Sandoval, C., Filipini, L., Vidal, R., 'Linking Transitional Justice and Corporate Accountability', *op. cit.*, p. 22.

<sup>737</sup> However, while apologies may seem simple, getting corporations to accept their wrongful behaviour and to apologise can prove difficult. See Sandoval, C., and Surfleet, G., 'Corporations and Redress in Transitional Justice Processes', in Michalowski, S. (ed.), *Corporate Accountability in the context of Transitional Justice*, *op. cit.*, p.110

<sup>738</sup> *Ibid.*

move toward development and not only as a way to return victims to the *status quo ante*.<sup>739</sup> This idea has challenged the traditional conception of restorative/retributive justice, suggesting a broader notion of *transformative justice*, in which corporations could play a central role in the economic reconstruction of the country, as well as contributing to the eradication of discrimination and poverty.<sup>740</sup> However, as was previously contended in chapters one and two, transformative justice still presents many challenges of implementation in practice.<sup>741</sup>

Corporations' role during conflict or repression should be also taken into account through the institutional reform process. Traditionally, institutional reform measures do not involve the business sector, as they are considered to be outside the scope of transitional justice. However, institutional reform could be essential to stop corporate impunity for human rights abuses. States involved in transitional justice processes must deal not only with the human rights violations committed, but also with the structures that made them possible.<sup>742</sup> In particular, legislative reforms are very relevant with regard to corporations, as the lack of legal regulation of their activities could only facilitate the commission of abuses. In this sense, it would be desirable to adopt legislation particularly regulating corruption and economic crimes.<sup>743</sup> Similarly, vetting processes can significantly improve governments' ability to fulfill ESCRs by excluding private actors from public concessions when they were involved in past human rights abuses, which would be essential as guarantees of non-repetition.<sup>744</sup>

#### **IV. 5 Intermediate conclusions**

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<sup>739</sup> See Inter-American Court on Human Rights, *Cotton Field v. Mexico*, Preliminary exceptions, merits, reparations and legal costs, 16 November 2009, para. 450, and UN General Assembly, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo, UN, Doc. A/HRC/14/22, 23 April 2010, para.31.

<sup>740</sup> Gready, P. and Robins, S., 'From Transitional to Transformative Justice: A New Agenda for Practice,' *op. cit.*, pp. 339–361. See also, Sánchez, N.C., 'Corporate Accountability, Reparations, and Distributive Justice in Post-Conflict Societies, in Michalowski, S., *Corporate Accountability in the context of Transitional Justice*, *op. cit.*, pp. 114-130.

<sup>741</sup> See section three, chapter II.

<sup>742</sup> Sandoval, C., Filipini, L., Vidal, R., 'Linking Transitional Justice and Corporate Accountability', *op. cit.*, p.24.

<sup>743</sup> UN Convention against Corruption, General Assembly Resolution 58/4, 31 October 2003, article 12.

<sup>744</sup> Szoke-Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *op. cit.*, p. 491.

This chapter firstly explored how corporations can be positively engaged in broad peacebuilding initiatives. While businesses can be strategic partners in such contexts and provide an added value, it has been contended that their inclusion should be approached cautiously, as their intervention can even be counterproductive when they act only out of self-interest. Current cases, such as the ongoing peace process in Colombia, served to illustrate that.

This chapter also examined how the effective inclusion of corporations in transitional justice processes can be articulated. Given that transitional justice aims to address the legacies of past violence and holding perpetrators accountable, it definitely contributes to broader peacebuilding efforts. Therefore, it has been argued that transitional justice strategies, as part of such peacebuilding efforts, should address the root causes of conflict and repression including all actors involved. However, it has been noted that this inclusion still presents some operational challenges, particularly with regard to the international framework for business and human rights. While the UNGPs, the latest initiative adopted within this framework, do not explicitly refer to transitional justice contexts, it has been contended that provisions contained in Principle 7 can be expanded to those situations. However, this principle does not impose specific obligations on corporations beyond conducting their operations with *due diligence* to ensure they do not get involved in human right abuses. The future possibility of the adoption of a binding treaty that would impose human rights direct obligations on corporations is still largely contested, but it would certainly contribute to changing the current scenario of legal indetermination. However, it does not seem so far that corporate accountability in transitional justice processes is a relevant issue to be considered within the working group discussions.

Finally, this chapter explored different ways by which corporate accountability could be effectively addressed in transitional justice processes, illustrating with examples how this has been done within the existing mechanisms in actual cases. Whereas TRCs have been so far the most frequent mechanisms preferred to deal with these issues, it has been shown that domestic trials, reparations policies and institutional reform could potentially also include corporate related abuses in transitional justice processes. Adopting such a comprehensive approach contributes to addressing the root causes of conflict or repression, as well as it would potentially enhance both the fields

of transitional justice and corporate accountability, facilitating the pathway to achieve a positive peace.



## **SECTION 3 – THE CASE STUDY: ARGENTINA**

### **V. CHAPTER FIVE – *Proceso de Reorganizacion Nacional*: the dark ages of Argentinian history (1976-1983)**

#### **V.1 Introduction**

Following the coup d'état of 24 March 1976, the military regime, the self-proclaimed *Proceso de Reorganizacion Nacional*, was established in Argentina (1976-1983). It was not the first coup in the Argentinian democratic institutional history, which had experienced six successful military coups between 1930 and 1976.<sup>745</sup> However, this last regime had a particular characteristic which set it apart from all previous ones: the nature and magnitude of its State repression, which was focused on neutralising the opposition while refunding a model of production based on the violent dispossession of workers.<sup>746</sup> Consequently, workers, and specifically their union representatives, were one of the main targets of this repression.<sup>747</sup> The suppression of rights and the disciplining of the working class were conceived as necessary means for imposing a distinctly neoliberal economic plan.<sup>748</sup>

The distinguishing method of repression was the practice of enforced disappearance of people,<sup>749</sup> which relied on an extensive network of over 500

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<sup>745</sup> For a further analysis about the previous coups and dictatorships see Horowicz, A., 'Las dictaduras Argentinas: historia de una frustración nacional', *Ensayo Edhasa*, 2016.

<sup>746</sup> Verbitsky, H. and Bohoslavsky, V., 'Introduction', in Verbitsky, H. and Bohoslavsky, V (eds.), *The Economic accomplices to the argentine dictatorship. Outstanding debts, op.cit.*, p.7.

<sup>747</sup> According to statistics and data collected, 30.2% of the disappeared were blue-collar workers, 17.9% white-collar workers. In total, the CONADEP estimated that 48.1% of people disappeared under the dictatorship were workers. CONADEP Final Report, 'Conclusions', 1984. Full document available in English at [http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain\\_001.htm](http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm), accessed 28 April 2018.

<sup>748</sup> See for instance, Basualdo, E.M. and Bona, L.M., 'La deuda externa (pública y privada) y la fuga de capitales durante la valorización financiera, 1976-2001', in Basualdo, E. (Ed.), *Endeudar y fugar. Un análisis de la historia económica argentina de Martínez de Hoz a Macri*, Siglo Veintiuno editores, 2017, p.17. For a general approach to the economic history of Argentina see Basualdo, E., *Estudios de historia económica argentina. Deuda externa y sectores dominantes desde mediados del siglo XX a la actualidad*, Flacso-Siglo XXI, 2006.

<sup>749</sup> International Convention for the Protection of All Persons from Enforced Disappearance. Available at

clandestine detention centres throughout the country's territory.<sup>750</sup> Victims were detained, interrogated, tortured and in many cases, then murdered. It has been estimated that up to 30.000 individuals were forcefully apprehended from their homes, workplaces or public thoroughfares by groups of armed agents called 'patotas'.<sup>751</sup> After abduction, nothing was ever known of their whereabouts.<sup>752</sup> But forced disappearances were not the only method of repression.<sup>753</sup> The overall toll also included 12,890 political prisoners, 500 children whose identities were altered through illegal adoptions, and an estimated 250.000 people, in a population of 25 million, forced into exile.<sup>754</sup>

This chapter provides a general assessment of the historical and sociopolitical context in which the last military rule took place in Argentina. It examines the main economic and social policies implemented by the regime, as well as how State repression was developed. It also pays special attention to the major role that specific companies and economic groups had under the regime and how they directly benefited from State repression. Ultimately, this chapter aims to examine human rights violations committed during that period.

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<http://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf> accessed 28 April 2018.

<sup>750</sup> While the CONADEP Report obtained proof of existence of 340 clandestine detention centres, the current number is higher, as recent studies have noted. See CONADEP Final Report, Part 1, D, 'Secret Detention Centres'. For an updated toll see for instance, Schindel, E., 'Ghosts and compañeros: haunting stories and the quest for justice around Argentina's former terror sites', *Rethinking History. The Journal of Theory and Practice*, 2014, p. 247.

<sup>751</sup> Romero, L.A., *A history of Argentina in the Twentieth Century*, Penn State University Press, 2006, p.217.

<sup>752</sup> According to Videla's declarations in 1979, '¿Qué es un desaparecido? En cuanto esté como tal, es una incógnita el desaparecido. Si reapareciera tendría un tratamiento X, y si la desaparición se convirtiera en certeza de su fallecimiento tendría un tratamiento Z. Pero mientras sea desaparecido no puede tener ningún tratamiento especial, es una incógnita, es un desaparecido, no tiene entidad, no está, ni muerto ni vivo, está desaparecido'. In English, '(...) these people were not either alive or dead, they were simply disappeared (...)'. See the transcripts for instance at Jinkis, J., 'Ni muerto ni vivo', Press article, Página 12, 5 October 2006. Available at <https://www.pagina12.com.ar/diario/psicologia/9-70866-2006-08-05.html> accessed 28 April 2018.

<sup>753</sup> The original notion in Spanish is 'desaparecidos'. As was later reflected in the prologue of the Truth Commission Report, the desaparecidos became 'a sad Argentine privilege', the Spanish word known throughout the world. CONADEP Final Report, Prologue to the first edition, 1984. We will use this Spanish term when referring to the victims of forced disappearances hereinafter, particularly in the next chapter.

<sup>754</sup> Crenzel, E., 'Introduction. Present Pasts: Memory (ies) of State Terrorism in the Southern Cone of Latin America', in Lessa, F. and Druliolle, V. (Eds), *The Memory of State Terrorism in the Southern Cone*, Palgrave Macmillan, 2011, p.2.

## V.2 International and national background.

Several studies have pointed out that this last military regime in Argentina and the scope of its repressive methodology should not be seen as an isolated phenomenon; in contrast, the last Argentinian dictatorship should be examined jointly with the international political context and particularly, with the political situation in Latin American and neighbouring countries.<sup>755</sup>

Within the context of the Cold War, the international political and economic relations were particularly complex. The world was mainly divided into two areas of influence: on one side, the United States; the Soviet Union on the other. The confrontation of these two nations extended from politics to economy. The capitalist market economy supported by the United States was also closely linked to liberal democracy and the idea of individualism and the relevance of civil and political rights. On the other side, the Soviet Union fostered the one-party system, an economy based on socialism and public property, and economic and social rights. Given that these two models were presented as mutually exclusive and in permanent conflict, adherence by and subordination of the rest of the countries were significantly constrained by their sphere of influence.<sup>756</sup> Consequently, political and economic autonomy of countries were also significantly curtailed.<sup>757</sup>

In that bipolar world, most Latin-American countries clearly fell under the influence of the United States, which consolidated the predominant role that it had already attained in the region. That was accompanied by a growing presence of large US companies, which headed processes of modernization, concentration and increasing

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<sup>755</sup> See for instance, Ansaldi, W., 'Matriuskas de terror. Algunos elementos para analizar la dictadura Argentina dentro de las dictaduras del Cono Sur', in Pucciarelli, A., (ed.), *Empresarios, Tecnócratas y Militares. La trama corporativa de la última dictadura*, Siglo XXI, 2004, pp. 27-29. See also O'Donnell, G., 'Las fuerzas armadas y el estado autoritario en el Cono Sur de América Latina', en O'Donnell, G., *Contrapuntos: ensayos escogidos sobre autoritarismo y democratización*, Buenos Aires, Paidós, 1997.

<sup>756</sup> For a deeper analysis of the international Cold War economic and political context see Westad, O.A., *The Global Cold War*, Cambridge University Press, 2005. Westad examines the competition between the two superpowers for their influence in the Third World and its impact on the processes of change in these countries, highlighting the role of ideology.

<sup>757</sup> Taiana, J., 'Foreign Powers, Economic Support, and Geopolitics', in Verbistky, H., and Bohoslavsky, JP. *The Economic accomplices to the argentine dictatorship. Outstanding debts, op. cit.*, p.61.

foreign ownership in the region's economies.<sup>758</sup> Within this context of political tensions, independent and autonomous national experiences, which questioned subordination to the US, were seen as a threat by the hegemonic power.<sup>759</sup> The Cuban Revolution clearly evidenced this tension as it exposed the region's prevailing inequality and injustices.

During these years, however, economic growth resulted in experiences of major changes in production, expansion of the public sector and the forming of massive trade unions. Consequently, social, political and economic demands proliferated. Governments, nevertheless, tended to repress instead of dealing with those demands. This drove to a cycle of social unrest, characterised by frequent economic crises, restrictive State policies and a growing involvement of the armed forces in the political sphere and leadership, as well as in crisis resolution, and even repressive activities.<sup>760</sup>

While armed forces had been historically involved in State policies in Latin America,<sup>761</sup> they took a significant dimension in this particular period under the so-called 'National Security Doctrine'.<sup>762</sup> The concept, developed in US military academies, provided a strategic framework for military action, particularly in the transnational fight against communism.<sup>763</sup> It became the official military doctrine in Latin-American countries and it completely changed the armies' traditional paradigm as it considered that enemies were not exclusively external but also a part of the population when allying with communism. Consequently, armed forces were no longer defenders

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<sup>758</sup> *Ibid.* p.64

<sup>759</sup> The cases of the Guatemala of Arbenz, toppled in 1954 with the open intervention of the United States, and the overthrow of Perón in Argentina in 1955 exemplify the disciplining actions taken and the curtailment of national and popular experiences.

<sup>760</sup> Taiana, J., 'Foreign Powers, Economic Support, and Geopolitics, in Verbitsky, H., and Bohoslavsky, JP. *The Economic accomplices to the Argentine dictatorship. Outstanding debts, op. cit.*, p. 65.

<sup>761</sup> In Argentina, for instance, the so-called 'Plan Conintes' (Plan de conmoción interna del Estado) was a military repressive doctrine. It was developed under the Presidency of Arturo Frondizi from 1958 to 1961 to repress strikes and workers' protests, student and citizen mobilizations in general and sabotage and guerrilla actions from the Peronist resistance. For more information, see Chiarini, S., and Portugheis, R.E., (Coord.) 'Plan Conintes' Represión política y sindical, Ministerio de Justicia y Derechos Humanos de la Nación. *Secretaría de Derechos Humanos. Archivo Nacional de la Memoria*, 2014.

<sup>762</sup> Originated in France, it was firstly denominated as 'Counterrevolutionary War Doctrine' and it was applied in the colonial wars of Indochina and Algeria. It was brought to Argentina by French instructors and widely disseminated in Latin-American countries by US institutions.

<sup>763</sup> For a further analysis, see Velásquez Rivera, E., 'Historia de la Doctrina de la Seguridad Nacional', *Convergencia. Revista de Ciencias Sociales*, vol. 9, no. 27, 2002, pp.11-39.

but repressors of their own citizens who were in their way to remove communism from the region.<sup>764</sup> Indeed, military dictatorships that affected Latin-American countries in the early 1970s were inspired by the National Security Doctrine, so they were characterised by toppling democratic governments, eliminating all forms of political participation and applying systematic repression policies.<sup>765</sup> Dictatorships' supporters aimed to return to social disciplining and limiting State economy control. Thus, any form of popular organization against these provisions had to be forcibly eradicated.<sup>766</sup> Similarly, cooperation between the USA and most Latin American dictatorships resulted in the creation of a joint secret intelligence and operations system denominated as 'Operation Condor'. The main goal of this partnership was 'to destroy the "subversive threat" from the left and to defend 'Western, Christian civilization'.<sup>767</sup> The founding act of Operation Condor was signed on 28 November 1975 and came into effect on 30 January 1976.<sup>768</sup> Countries that took part in the collaboration were initially Argentina, Chile, Uruguay, Paraguay, Brazil and Bolivia, later joined by Peru and Ecuador.<sup>769</sup>

With regard to the national political and social context, Argentina had experienced six successful military coups within its recent democratic history, as mentioned in the introduction. In 1930, it overthrew the constitutional government of Hipólito Yrigoyen; in 1943 it avoided the fraudulent electoral victory of Robustiano Patrón Costas; in 1955 the coup overthrew the constitutional government of General Peron; both in 1962 and in 1966 the coup had only one object: preventing the electoral triumph of Peronism. The last one in 1976 was executed under the banner of avoiding

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<sup>764</sup> Ansaldi, W., 'Matriuskas de terror. Algunos elementos para analizar la dictadura argentina dentro de las dictaduras del Cono Sur', in Pucciarelli, A., (ed.), *op. cit.*, p.30.

<sup>765</sup> Two emblematic experiences in the region were the Unidad Popular government headed by Salvador Allende in Chile and the return of Peronism and Perón to the government in Argentina. Both represented efforts to transform economically dependent societies dominated by oligarchic sectors and foreign capital into participatory democracies, in which key sectors of the economy would be controlled by the State. See Taiana, J., 'Foreign Powers, Economic Support, and Geopolitics, in Verbitsky, H., and Bohoslavsky, JP. *op. cit.*, p. 67.

<sup>766</sup> *Ibid.*

<sup>767</sup> McSherry, J.P., *Predatory States: Operation Condor and covert war in Latin America*, Rowman & Littlefield Publishers, Inc, 2005, p.1.

<sup>768</sup> Operación Cóndor, Acta fundacional de 21 November 1975, available at <http://constitucionweb.blogspot.com.es/2010/01/operacion-condor-acta-fundacional.html> accessed 29 April 2018.

<sup>769</sup> A further analysis on how the Operation Condor worked in practice is done in the next section of this chapter.

the triumph of the revolutionary guerrilla. In a nutshell, two blows were made against presidents of perfect legality (Yrigoyen and Perón), three to avoid an electoral result (1943, 1962, 1966) and one to install a bourgeois military dictatorship. After this last one, it started a new cycle of national history with little institutional stability but also without coups d'état.<sup>770</sup>

During the last months of the Peronism government of María Estela de Perón,<sup>771</sup> social unrest and permanent threat of military conspiracy were the remarkable rule. Economic crisis but also political weakness and feelings of lack of government legitimation led to the decrease of society's support for the government, which was notably manifested through numerous protest and demonstrations. Similarly, political parties were also seen as incapable of providing alternative solutions, which discredited the whole democratic system.<sup>772</sup> Radicalisation of some of those political parties in the late 1960s, which developed armed action, also revealed a significant level of political violence. They were linked both to Peronism and left-wing guerrilla groups. Most relevant groups were *Montoneros* (leftist Peronism), the guevarist *Ejército Revolucionario del Pueblo* (ERP) and the armed faction of *Partido Revolucionario de los Trabajadores* (PRT). While their forces and capabilities were significantly declining in the last year of the Peronism government, they still maintained an important role in the public scene.<sup>773</sup>

Within this international and national context, on 24th of March 1976, a military *coup* ended the government of Maria Estela Perón. It was actively -but silently- supported by the Gerald Ford-led USA administration.<sup>774</sup> In fact, it has been revealed

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<sup>770</sup> Between 1880 and 1976, citizens voted according to constitutional guarantees in 1916, 1922, 1928, 1946, 1951 and 1973. See Horowicz, A., 'Las dictaduras Argentinas: historia de una frustración nacional', *op. cit.*, p.33.

<sup>771</sup> Also commonly known as Isabel o Isabelita.

<sup>772</sup> Hernán Benítez, D. and Mónaco, C., 'La dictadura militar, 1976-1983', in Kessler, G. y Luzzi, M., *Problemas Socioeconómicos contemporáneos*, Buenos Aires, Universidad Nacional de General Sarmiento, 2007, p.1.

<sup>773</sup> *Montoneros*, for instance, still retained some operational capacity during the first year of the Process, but they were certainly unable to develop large-scale operations or to confront the armed forces offensive. Therefore, they focused on indiscriminate targets that required a minimum of personnel mobilization. See Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática*, Historia Argentina tomo 9, Paidós, 2013, pp. 76-80.

<sup>774</sup> Department of State telegram, Buenos Aires, A-143, U.S. Embassy (Montllor) to secretary of State (Kissinger), June 16, 1975, subject: 'Political Violence in Argentina,' quoted in Schmidli, W.,

that the U.S. Embassy in Buenos Aires viewed 'leftist terrorism' as a 'threat to U.S. business interests.' This was also evidenced, for instance, in the reporting of the coup of the U.S. Embassy in Buenos Aires as 'probably the best executed and most civilized coup in Argentine history'. According to its assessment of the situation, interests of both Argentina and the United States depended on the 'success of the moderate government now led by General Videla'.<sup>775</sup> In addition, within forty-eight hours after the *coup*, the United States formally recognized the new government and the International Monetary Fund granted it a previously approved loan of US\$127 million. However, the embassy would soon start showing its concern about the serious reports of human rights abuses perpetrated by members of the security forces.<sup>776</sup>

### **V.3 Coup and establishment of Military Juntas**

#### **V.3.A Military Juntas**

Immediately after the coup, the Junta commanders-in-chief, General Jorge Rafael Videla, Admiral Emilio Eduardo Massera, and Air Force Brigadier Orlando Ramón Agosti, assumed power. This started the self-proclaimed *Proceso de Reorganización Nacional*,<sup>777</sup> which would be ruled by four military juntas from 1976 to 1983. General Videla was designated as president of the Nation, a position that he held as army commander until 1978.

As happened with the military coup in 1966, capitalist sectors as well as an important part of the society expected the new government to solve the economic crisis and to restore the social order. However, there were significant differences amongst the methodologies used by previous governments and the new one. Likewise, it should be noted that the Process was marked by internal power struggles between different

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'Institutionalizing Human Rights in US Foreign Policy: US-Argentine Relations 1976–1980', *Diplomatic History*, vol. 35, issue 2, 2011, p. 355.

<sup>775</sup> Department of State telegram, Buenos Aires, 2061, U.S. Embassy (Hill) to secretary of State (Kissinger), 29 March 1976. *Ibid.* p. 359.

<sup>776</sup> Taiana, J., 'Foreign Powers, Economic Support, and Geopolitics', in Verbitsky, H., and Bohoslavsky, JP. *The Economic accomplices to the Argentine dictatorship. Outstanding debts, op. cit.*, p.69.

<sup>777</sup> The selected name of the new regime actually reveals the kind of economic and social policies that the government wanted to implement.

factions of the government, motivated both by leadership conflicts, as well as by different political projects.<sup>778</sup>

The Military Junta dissolved the National Congress and conferred the legislative powers to the executive power. It also changed the composition of the Supreme Court of Justice and the *tribunales superiores de provincia*.<sup>779</sup> Those judges who chose to keep their post had to swear loyalty to the Junta, and specifically to one document: 'Actas y Objetivos del Proceso de Reorganización Nacional'. Amongst other provisions, this text read:

First: Declare the mandates of the president of the Argentine Nation and the governors and vice-governors of the provinces expired. [...]

Third: Dissolve the National Congress, the provincial Legislatures, the Representative Room of the city of Buenos Aires, and the municipal councils of the provinces or similar organizations.

Fourth: Remove the members of the Supreme Court of justice of the Nation, to the Procurator General of the Nation and to the members of the Provincial Superior Courts. [...]

Sixth: Suspend political activity and political parties at the national, provincial and municipal levels. Seventh: Suspend the trade union activities of workers, businessmen and professionals.

[...] Ninth: Designate, once the aforementioned measures have been carried out,

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<sup>778</sup> For instance, in 1977, the labour minister Horacio Tomás Liendo, an ally of Videla, organized a joint delegation with union leaders to attend sessions of the International Labour Organization. One of those leaders, Oscar Smith, was kidnapped and disappeared days before his journey by forces under the direction of General Suárez Mason. Smith's abduction was intended to put a limit on the capacity of the moderates to determine a trade union policy without an agreement with the other parts of the armed forces. Avenburg, A., *Una Dictadura Fragmentada: Conflictos Intra-Militares y las relaciones entre la Argentina y los Estados Unidos durante la presidencia de Videla. Postdata*, 2015, vol.20, n.2, pp.455.

<sup>779</sup> There was one Court for each of the provinces of Argentina. They established the administration and organization of ordinary justice within their territory.



the citizen who will exercise the office of President of the Nation.<sup>780</sup>

The legal constitutional regime and division of powers were, thus, eliminated. In fact, the Junta concentrated executive, legislative and judicial powers. Consequently, the possibility to attend to the judiciary to guarantee the limits of arbitrary actions was completely eradicated.

In 1978 and 1979, initial commanders-in-chief were replaced as was originally planned. However, General Videla was confirmed as President for three additional years to support policy measures, particularly economic policies, taken until then. In July 1978, General Viola was designated as commander-in-chief of the national army, replacing Videla in this position. In September, Admiral Lambruschini replaced Massera, and in January 1979, Agosti was replaced by Brigadier Omar Graffigna. In 1981, Viola was designated President. However, he was replaced by General Leopoldo Galtieri, who ruled the third Junta together with Admiral Jorge Anaya and Brigadier Basilio Lami Dozo until 1982. Following the historic military defeat in Malvinas/Falklands and with the increase of social and political unrest, Reynaldo Bignone was appointed as President of the fourth Junta, together with General Cristino Nicolaidis, Admiral Rubén Franco and Brigadier Augusto Hughes. Bignone had as a main goal to find a political settlement and 'to institutionalise the country, in March 1984 the latest.'<sup>781</sup>

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<sup>780</sup> Original in Spanish Stated: 'Primero: Declarar caducos los mandatos del presidente de la Nación Argentina y de los gobernadores y vicegobernadores de las provincias. [...] Tercero: Disolver el Congreso Nacional, las Legislaturas provinciales, la Sala de Representantes de la ciudad de Buenos Aires, y los Consejos municipales de las provincias u organismos similares. Cuarto: Remover a los miembros de la Suprema Corte de justicia de la Nación, al Procurador General de la Nación y a los integrantes de los Tribunales Superiores provinciales. [...] Sexto: Suspender la actividad política y de los partidos políticos a nivel nacional, provincia] y municipal. Séptimo: Suspender las actividades gremiales de trabajadores, empresarios y de profesionales. [...] Noveno: Designar, una vez efectivizadas las medidas antes señaladas, al ciudadano que ejercerá el cargo de Presidente de la Nación'. Transcript from the Newsletter 'La Opinión' can be found at [http://www.cacheirofrias.com.ar/Acta\\_del\\_Proceso\\_de\\_Reorganizacion\\_Nacional.pdf](http://www.cacheirofrias.com.ar/Acta_del_Proceso_de_Reorganizacion_Nacional.pdf) accessed 29 April 2018. Diario La Opinión, 25 de marzo de 1976, pp. 1-13.

<sup>781</sup> Author's translation. Alonso, M.E., and Vásquez, E.C, *Historia Argentina 1976-2013. Proyecto de país en pugna: de la última dictadura cívico militar al kirchnerismo*, Aique Grupo Editor, 2013, p.48.

### V.3.B Economic policy and social repression

*The Process* set out to install a widespread disciplining of the Argentinian society. It mainly used two kinds of systemic violence to achieve this goal: State repression and market violence.

The military government shortly suppressed civil rights and public freedoms, remarkably the last part of article 23 of the National Constitution, which regulated conditions in which a State of siege can be declared. In parallel, the Junta suspended political parties and trade union activities. They dissolved the CGT (Confederación General de los Trabajadores) and CGE (Confederación General Económica) and took control of trade unions and labour federations. Similarly, the right to strike was suspended. All these restrictive measures were considered as necessary requirements to develop and to achieve the new economic plan.

Shortly after the coup, José Alfredo Martínez de Hoz was appointed as Minister of Economy. He had to face a deep crisis in the business cycle, which included recession, rising inflation and problems with the balance of payment.<sup>782</sup> Amongst governing forces, it was widely agreed by that time that interventionist and welfare State, such as it had been constituted since 1930, was the great culprit and the market seemed to be the solution to equally disciplining all the social actors.<sup>783</sup> In 1976, the Minister presented his 'Recovery, Sanitation and Expansion Program of the Argentine Economy' ('Programa de recuperación, saneamiento y expansión de la economía Argentina'). This programme was mainly based on financial reform and trade liberalization, and sought to generate a growth model based on the financial system, re-articulation of the agro-export model and dismantling of industrial space.<sup>784</sup> Amongst the most significant measures implemented by this initiative, were the adoption of an ultra-restrictive monetary policy, a reform of the financial institutions law and the liberalization of the capital account. The core of the national economy was in the financial sector, which led to a very unstable economy as most money was placed in

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<sup>782</sup> Romero, L.A., *A history of Argentina in the Twentieth Century*, op. cit., p. 221.

<sup>783</sup> *Ibid.*

<sup>784</sup> Celeste Perosino, M., Nápoli, B., Bosisio, W.A., (Coords), *Economía, política y sistema financiero: la última dictadura cívico-militar en la Comisión Nacional de Valores*, Ciudad Autónoma de Buenos Aires: Comisión Nacional de Valores, 2013, p.30.

short-term activities and capital could -and would- leave the country unhindered if conditions changed.<sup>785</sup> One of the main instruments that Martínez de Hoz also implemented was the so-called 'la tablita', adopted in December 1978. It was a sort of calendar of devaluations. The future peso-dollar parity, public tariffs, minimum wages and credit had their own 'tablitas'. This set of schedules should tend to stabilise prices, but in practice it just showed that Argentina faced a wide range of structural problems.<sup>786</sup>

With the opening of trade, the protection of the domestic market was reduced and imports were liberalized.<sup>787</sup> But this opening was not the same for all actors, giving priority to those sectors that were under protection of the Government, given their links to local capital, namely automotive, steel, petrochemical, paper and sugar, amongst others.<sup>788</sup> All this combined with the growing financial short-termism profoundly affected investment and all productive sectors and the GDP growth.<sup>789</sup> Moreover, Martínez de Hoz accompanied the economic model with a program of peripheral privatisations, starting with the outsourcing of certain activities that passed from the State to the private sector, giving rise to the configuration of a 'neoclassical State privatizing'.<sup>790</sup> The external debt drastically rose as a consequence of the new economic model, in which local business and transnational companies assumed debt to obtain income through financial placements.<sup>791</sup> The State, however, increased public spending

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<sup>785</sup> Romero, L.A., *A history of Argentina in the Twentieth Century*, op. cit., p. 225.

<sup>786</sup> Such as an indexed economy, prices rose faster than the depreciations of the front to the dollar which led to a real appreciation of the currency and a growing deterioration of the trade balance, lowering imported products and making local exports more expensive. See, for instance, 'Control de precios de inflación: la experiencia argentina reciente'. *Fundación de Investigaciones Económicas Latinoamericanas*, Manantial, 1990.

<sup>787</sup> An holistic interpretation of the structural changes operated from the military coup can be found in Basualdo, E.M, *Estudios de historia económica argentina. Desde mediados del siglo XX a la actualidad*. Siglo XXI editores, 2006. Specifically, chapter 3 'Instauración de un nuevo modo de acumulación de capital a partir de la dictadura militar (1976-1983)'.

<sup>788</sup> Celeste Perosino, M., Nápoli, B., Bosisio, W.A., (Coords), *Economía, política y sistema financiero: la última dictadura cívico-militar en la Comisión Nacional de Valores*, op. cit., p.31.

<sup>789</sup> For a further analysis on this issue see for instance, Basualdo, E.M. La reestructuración de la economía argentina durante las últimas décadas de la sustitución de importaciones a la valorización financiera. *En Neoliberalismo y sectores dominantes. Tendencias globales y experiencias nacionales*. Basualdo, E.M.; Arceo, E. FLACSO, Consejo Latinoamericano de Ciencias Sociales, Buenos Aires, 2006.

<sup>790</sup> About the outsourcing trends see Basualdo, V., and Morales, D., *La tercerización laboral. Orígenes, impacto y claves para su análisis en América Latina*, Siglo XXI editores, 2014.

<sup>791</sup> Basualdo, E., *Sistema político y modelo de acumulación. Tres ensayos sobre la Argentina actual*, Ed. Atuel, Cara o Ceca, 2011, p.54.

but only at the expense of a reduction of other sectors, such as the health budget and education.<sup>792</sup>

In February 1981, the external debt was dramatically high. The economic plan implemented by Martínez de Hoz was not meeting the expectations, which meant his dismissal and the end of the government of Videla. Lorenzo Sigaut was then appointed as the new Minister of Economy, whose policies tended to slow down the liberalization process. However, an economic crisis and internal disputes amongst military forces led to the third military Junta, ruled by Galtieri. This third military government and its Minister of Economy, Roberto Alemann, adopted a set of orthodox economic measures that returned to the liberal approach that Martínez de Hoz started. The lack of success dealing with a long-worsening economic crisis and the defeat in the Malvinas war marked the beginning of the end of the Process. Under this last government, Argentina developed an unprecedented harsh redistribution of income to the detriment of workers. The monetarist economic policy implemented by the regime cut short the process of industrialization and put financial valorisation at the centre of the country's economy.<sup>793</sup>

While the last Argentinian dictatorship is characterised by the social disciplining and the magnitude of its State terrorism, it should be noted that State repression started before the coup. José López Rega, Minister of Social Welfare during the last government of Perón, founded the Triple A or Argentine Anti-Communist Alliance.<sup>794</sup> This right-wing organization, inspired by fascist principles, perpetrated at least 900 killings between 1973 and 1976.<sup>795</sup> Financially and logistically supported by important State agencies, such as the Ministry of Social Welfare and national and provincial police structures,<sup>796</sup> it only disappeared after the coup, when its members were incorporated in the repressive apparatus of the *Process*. At that moment, a State of siege

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<sup>792</sup> In fact, the education and health budget was the lowest in Argentinian history. Celeste Perosino, M., Nápoli, B., Bosisio, W.A., (Coords), *Economía, política y sistema financiero: la última dictadura cívico-militar en la Comisión Nacional de Valores*, op. cit., p. 32.

<sup>793</sup> Basualdo, E.M. and Bona, L.M., 'La deuda externa (pública y privada) y la fuga de capitales durante la valorización financiera, 1976-2001', in Basualdo, E. (Ed.), *Endeudar y fugar. Un análisis de la historia económica argentina de Martínez de Hoz a Macri*, op. cit. p.19.

<sup>794</sup> Alianza Anticomunista Argentina

<sup>795</sup> Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática*, op.cit., p.81.

<sup>796</sup> Further information about the origins and development of the Triple A can be found on Leis, H., *Un testamento de los años 70. Terrorismo, política y verdad en Argentina*, Katz Editores, 2013.

was declared and security forces were under operational control of the army.<sup>797</sup> The Military Junta adopted an extensive repressive legislation that allowed for lengthy detentions and imposed heavy penalties for minor offences motivated politically or related to guerrilla activities.<sup>798</sup> So, the repressive plan ideologically and strategically continued after the coup but involving the security and defense State system to carry on what the paramilitary were doing during the last democratic government. Such a strategic plan was clearly inspired by the 'National Security Doctrine', which identified a social and ideological enemy who acted in different contexts and organizational forms and methods: what they called 'subversion'. While Marxism and leftism were conditions directly recognised as subversive by security forces,<sup>799</sup> there were many other factors too, such as being communist, Peronist, atheist or simply revolutionaries in general. Merely fostering or acting in favour of any social change was considered as going against the order.<sup>800</sup>

Repressive State policy in Argentina was also based on the above-mentioned 'Operation Condor', which consisted of a highly sophisticated system through which the dictatorial regimes in the Southern Cone exchanged intelligence information. Through this collaboration, dictatorships' governments could coordinate the surveillance of targeted political dissidents and share a list of the 'most wanted subversives'.<sup>801</sup> The target group was broadly defined (for further details, see section four of this chapter). In fact, Jorge Rafael Videla Stated in a comment made in 1976, '[a] terrorist is not just someone with a gun or a bomb, but also someone who spreads ideas that are contrary to Western and Christian civilization.'<sup>802</sup> But repressive norms were not enough, so it was necessary to go beyond to permanently eradicate subversion. The used method basically consisted in abducting the suspect by organised groups -commonly known as 'the gang'

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<sup>797</sup> The State of siege will continue until December 1983.

<sup>798</sup> Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática*, *op. cit.* p.82.

<sup>799</sup> It should be noted that different treatment was given to different enemies. So, for instance, Marxists were considered as *irrecoverable* and consequently were killed or disappeared. By contrast, Christians, even if they were part of 'Montoneros', had options to be considered as recoverable so, in some cases they were forced to collaborate with repression, and eventually, released.

<sup>800</sup> Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática*, *op. cit.*, p.89.

<sup>801</sup> Blaauw, M. and Lähteenmäki, V., 'Denial and silence' or 'acknowledgement and disclosure', *International Review of the Red Cross*, vol.84, issue 848, 2002, p. 772.

<sup>802</sup> Quote cited in McSherry, J.P., *Predatory States: Operation Condor and covert war in Latin America*, *op. cit.*, p. 1.

(*la patota*), preferably during the night.<sup>803</sup> Subsequently, suspects were hooded and transferred to some clandestine detention camp where they were tortured. Most of them were finally killed and their bodies disappeared.<sup>804</sup> Indeed, the main purpose of the use of enforced disappearance was to instill terror amongst the population to constrain and eradicate any aspiration of social justice.<sup>805</sup> Another usual practice was to rob victims: their houses, their cars or any other property. Similarly, they established mechanisms to falsify property deeds, so they provided an incentive to group tasks and they financed some of their activities at the same time. Even the children of those who were considered subversives were part of the *war boot*. Typically, children would be appropriated, and be adopted by military or pro-regime families.<sup>806</sup> The Argentinian Truth Commission (CONADEP) and later reports have documented around two hundred of these cases.<sup>807</sup>

The complex repressive plan covered a wide range of victims but it was not indiscriminate. Within their blurred definition of subversion, they identified two main fields with special relevance for their repressive actions: trade unions and education. Consequently, their greatest efforts were focused on these two sectors.<sup>808</sup>

#### **V. 4. Civilian involvement: a special focus on corporations and economic groups**

It is now widely known and accepted that significant groups of civil society were actively and directly involved with the *Process*. This is the reason why the regime has been lately referred to as a civil-military dictatorship.<sup>809</sup> However, it has been only recently that scholars and practitioners started to deeply analyze these civilian

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<sup>803</sup> CONADEP Final Report, 'The Abduction'. The report established that 62 % of victims were abducted during the night and 38% during the day.

<sup>804</sup> Throwing them into the ocean, into dikes or rivers; burning or burying them unidentified in mass graves, in cemeteries, on military terrain or elsewhere.

<sup>805</sup> McSherry, J.P., *Predatory States: Operation Condor and covert war in Latin America*, op. cit., p. 6.

<sup>806</sup> For a further analysis on this issue see Graham-Yooll, A., *Who Do You Think You Are?: The Search for Argentina's Lost Children*, Seagull Books, 2011 or Abuelas de Plaza de Mayo, *Niños Desaparecidos, Jóvenes Localizados: En la Argentina de 1976 A 1999*, Temas Grupo Editorial.

<sup>807</sup> Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática*, op. cit., p. 113.

<sup>808</sup> *Ibid.* p.114.

<sup>809</sup> Some authors have even used the term 'corporate military dictatorship', See for instance, Nápoli, B., Celeste Perosino, M., Bosisio, W., *La dictadura Del capital financiero. El golpe militar corporativo y la trama bursátil*, Ediciones Continente, 2014, p.42.

connections with the military power. Latest findings have shown that some of these groups played a key role in supporting and benefiting from State repression. Important linkages have been found with a different sort of civilian actors, namely officials of the Executive and Judicial Power,<sup>810</sup> health professionals, members of the Catholic Church,<sup>811</sup> and companies.<sup>812</sup>

Economic policies implemented during the *Process* substantially modified the paradigm of Argentinian economic power, and as consequence, a small elite of companies and economic groups directly benefited.<sup>813</sup> An illustration can be found in the phenomenon of public-private circulation, through which some of these businessmen assumed strategic positions in public administration and *vice versa*.<sup>814</sup> Martínez de Hoz, who was president of the company *Acindar* just before being appointed as Minister of Economy, is the most representative example of that. However, he is not the only one. Francisco Soldati, president of the *Soldati Group*, was appointed as director of the Central Bank; Valentín Oxenford, president of *Alpargatas*, was controller of the Argentine Industrial Union between 1979 and 1981, and then became Minister of Industry during the Viola government from April to August 1981. Selected companies and economic groups also benefited from economic transformations implemented by the dictatorship. For instance, Domingo Cavallo, as director of the Central Bank, adopted measures to alleviate corporations' internal debts. The private external debt of at least 68 companies was nationalised.<sup>815</sup> Subsidiaries of multinationals such as *Renault Argentina*, *Mercedes-Benz Argentina*, *Ford Motor Argentina*, *IBM Argentina*, *City Bank*, *Bank of America*, and *Deutsche Bank* enjoyed those benefits.<sup>816</sup> But not all companies enjoyed the new regime's privileges. By

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<sup>810</sup> The military removed from their posts the judges they considered opponents, replacing them with judges more favourable to their purposes. For a further analysis on the complicity and implications of the judicial power and lawyers see Bohoslavsky, JP., *¿Usted también, doctor? Complicidad de jueces, fiscales y abogados durante la dictadura*, Siglo XXI Editores, 2015.

<sup>811</sup> About the role of the Catholic Church, see Mignone, E., *Iglesia y dictadura. El papel de la Iglesia a la luz de sus relaciones con el régimen militar*, Ediciones del Pensamiento Nacional, Colihue, 2006.

<sup>812</sup> See generally Ascitutto, A.E., Hidalgo, C., Izaguirre, I. (eds), *Negocios y Dictadura. La conexión argentino-italiana*, Imago Mundi, 2017.

<sup>813</sup> Economic groups are made up of companies that belong to the same person or family.

<sup>814</sup> This phenomenon is colloquially known as 'swing doors' (puertas giratorias).

<sup>815</sup> Nápoli, B., Celeste Perosino, M., Bosisio, W., *La dictadura del capital financiero. El golpe militar corporativo y la trama bursátil*, *op. cit.*, p.33.

<sup>816</sup> *Ibid.*

contrast, about another 600 companies were liquidated, taken over or appropriated.<sup>817</sup> Differing, or not being in line with the dictatorship's economic policies, was in those cases sufficient reason to be expropriated. Similarly, it is worth mentioning that some high and powerful representatives of trade unions were also involved and benefited from workers' repression.<sup>818</sup>

Between 1976 and 1982, Argentina received an increasing volume of credits, initially from States and multilateral bodies,<sup>819</sup> and later from major commercial banks of industrialised countries. While no consolidated data are available on loan volume and lender identity, some international banks such as *Citibank N.A*, *Lloyd's Bank International Ltd.*, and *Bank of Montreal* amongst others, granted credits to the dictatorship.<sup>820</sup> These loans were relevant in terms of consolidating the regime and thus, the repressive policies they implemented and as Bohoslavsky noted, these creditors ignored the most basic rules of credit assessment, which laid the groundwork for the debt crisis that would erupt in 1982.<sup>821</sup>

Corporate involvement in the last Argentinian dictatorship went beyond just benefiting economically. The Businesses were complicit in the exercise of repressive power against workers in factories.<sup>822</sup> Both the army and companies shared a common

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<sup>817</sup> For instance, the case of the Iaccarino brothers. These two businessmen were kidnapped, held in nine different clandestine detention centres, and forced to sign over their property to a financial group while still captive. Dandan, A., 'The National Securities Commission and the Assault on "Economic Subversion"', in Verbitsky, H and Bohoslavsky, J.P., *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*, op. cit., p. 290.

<sup>818</sup> Such as SMATA (Sindicato de Mecánicos y Afines del Transporte Automotor) at Mercedes Benz Factory. Victoria Basualdo interview, June 2017, Buenos Aires, Argentina. See also Cieza, D., 'Subversión industrial' y estigmatización de los sindicalistas en la última dictadura cívico-militar', Ponencia para las Jornadas de la Carrera de Ciencias de la Comunicación 2012 'Comunicación y Derechos Humanos', Homenaje a Eduardo Luis Duhalde. Universidad de Buenos Aires, 2012, p.5.

<sup>819</sup> See for instance, 'Estados Unidos reconoció a la junta. Crédito del FMI', Clarín, March 27, 1976; or D. Albín, 'España financió a la dictadura de Videla', Público, October 20, 2014. Available at [www.publico.es/politica/espana-financio-dictadura-videla.html](http://www.publico.es/politica/espana-financio-dictadura-videla.html) accessed 28 April 2018.

<sup>820</sup> Calcagno E., 'Los bancos transnacionales y el endeudamiento externo en la Argentina' Cuadernos de la CEPAL, nº 56, 1987, pp.25 and 108.

<sup>821</sup> About these issues see Bohoslavsky, J.P., 'Complicity of the Lenders', in Verbitsky, H and Bohoslavsky, J.P., *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*, op. cit., pp.105-116.

<sup>822</sup> The main scientific report on this topic is 'Responsabilidad empresarial en delitos de lesa humanidad. Represión a los trabajadores durante el terrorismo de Estado', Tomo I y II, Editado por la Dirección Nacional del Sistema Argentino de Información Jurídica, 2015. Available at <http://flacso.org.ar/wp->



concern about the conflict between capital and labour. Consequently, repression did not only target dissidents and radicalized political militancy, but also sought to discipline the working class which had accumulated political and social power over decades before.<sup>823</sup>

Evidence has shown that the pattern of collaboration between employers and the repressive forces was repeated in a large number of cases. As a general example, the business forum IDEA (Institute for the Development of Entrepreneurs of Argentina)<sup>824</sup> published shortly after the coup an explanatory booklet on what they called the subversive threat in the trade union sphere. The document recommended the employers should inform the armed forces about those who could be considered as suspected workers.<sup>825</sup> The brochure was widely distributed and on many occasions, businessmen and managers responded positively, providing information for task groups to kidnap their 'subversive' workers. Many companies found in this mechanism a simple way of solving their union problems, perfectly aware that they were not denouncing guerrillas.<sup>826</sup>

Companies put into practice a wide range of repressive practices, such as providing workers information to the armed forces, supplying logistical and material resources and even allowing clandestine detention centres within their factories, amongst others.<sup>827</sup> Those practices, both because of their own nature, and because they were part of State repression, have been conceptualized in the literature as crimes against humanity.<sup>828</sup> However, as will be further analysed in chapter six, just a very few

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[content/uploads/2017/03/Responsabilidad-empresarial-en-delitos-de-lesa-humanidad-II.pdf](https://content/uploads/2017/03/Responsabilidad-empresarial-en-delitos-de-lesa-humanidad-II.pdf) accessed 2 May 2018.

<sup>823</sup> 'Responsabilidad empresarial en delitos de lesa humanidad. Represión a los trabajadores durante el terrorismo de Estado', *op. cit.*, p.2

<sup>824</sup> Originally, 'Instituto para el Desarrollo de Empresarios de la Argentina'.

<sup>825</sup> Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática*, *op. cit.*, p.115.

<sup>826</sup> *Ibid.*

<sup>827</sup> 'Responsabilidad empresarial en delitos de lesa humanidad. Represión a los trabajadores durante el terrorismo de Estado', *op. cit.*, p. 1.

<sup>828</sup> The Truth Commission used this conceptualization in its final report when analyzing the set of State repression practices, but not specifically concerning corporations' participation. The focus then was on the military forces, so civic complicity was not explored. Later, scholarship have characterised the set of corporate practice also as crimes against humanity, as an understanding that they took place within the framework of State repression policies. See for instance in this sense, 'Responsabilidad empresarial en delitos de lesa humanidad. Represión a los trabajadores durante el terrorismo de Estado', *op. cit.*, p.1.

businessmen have been subjected to judicial processes according to these charges, and with variable outcomes.<sup>829</sup>

Some of the most significant cases of corporate involvement include transnational companies, such as *Ford Motors Argentina and Mercedes Benz*, but also important national businesses such as *Ledesma, Acindar and Dálmine Siderca*.<sup>830</sup> While repression was led and primarily carried out by the armed forces, it enjoyed the active support of large corporations, which reported their workers to the police, supplied funds to repressive forces, and in cases such as *Ford* and *Acindar*, authorised the establishment of clandestine detention centres in the premises of their factories.<sup>831</sup> The so-called ‘Noche del Apagón’ rightly illustrates these patterns of collaboration between companies - *Ingenio Ledesma* in this case- and the military regime. During the night of 27 July, 1976, the power station of General San Martín cut power supply while military forces and foremen of *Ledesma* illegally entered and looted workers’ homes in the villages of *Libertador San Martín* and *Calilegua*. Using company vehicles, more than 400 workers and students were abducted and transferred to the company’s sheds. After torture sessions and interrogation, some were released, others were sent to police stations or military barracks, and others appeared in prisons in different provinces. Thirty neighbours have never been traced.<sup>832</sup>

In 1998, representatives of the CTA lodged a complaint to Judge Baltasar Garzón in which it was stated that relevant facts show ‘the existence of a plan agreed upon by the major economic groups and the armed forces to implement State terrorism and genocide with the aim of socially disciplining the working class’.<sup>833</sup> It also

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<sup>829</sup> Marcos Levin was sentenced to prison in 2015 but the judgment was later annulled. On the other hand, the trial of two Ford Motors executives for crimes against humanity started in November 2017 after more than fifteen years of material and procedural obstacles. Both cases and their effects will be further analysed in chapter six.

<sup>830</sup> See for instance, Basualdo, V., ‘Complicidad patronal-militar en la última dictadura argentina: Los casos de Acindar, Astarsa, Dálmine Siderca, Ford, Ledesma y Mercedes Benz’, *Revista Engranajes de la Federación de Trabajadores de la Industria y Afines (FETIA)*, no. 5 (edición especial), 2006.

<sup>831</sup> *Ibid.* p. 8-10.

<sup>832</sup> More information about this incident in Catela Da Silva, L., *No habrá flores en la tumba del pasado. Experiencias de reconstrucción del mundo de los familiares de desaparecidos*, La Plata, Al Margen, 2001.

<sup>833</sup> ‘Responsabilidad empresarial en delitos de lesa humanidad. Represión a los trabajadores durante el terrorismo de Estado’, *op. cit.*, p.4 ‘Presentación de la Central de Trabajadores Argentinos ante el Juez del Juzgado Central de instrucción No. 5 de la Audiencia General de Madrid, realizada en Marzo de 1998.

evidenced a clear pattern of common functioning, based on different cases of business-military complicity and linking them. That complaint was the starting point to develop further institutional research about those linkages.

Ultimately, Armed Forces were supported by the dominant elites that found the *Process* an opportunity to take economic advantage, while eliminating political radicalization and disciplining workers. That alliance was based on a sense of class revenge in order to reframe the national project. As a result of the policies implemented, there was a significant redistribution of income from the salaried sectors to the whole of the non-salaried, real wages, the rescheduling of the labour market, the deterioration of working conditions and the increase in working hours.<sup>834</sup> As Recalde noted, civilian-military complicity was present at the very conception of the coup and in its planning and subsequent execution. Thus, the dictatorship involved representatives from different spheres of society, and particularly, from the private economic sector.<sup>835</sup>

## **V. 5 Workers as a target of repression**

### **V.5. A The extended notion of ‘subversion’**

The Argentinian Truth Commission’s final report highlighted not only the working class membership of many of the victims, but also emphasised the existence of collective abductions and arrests within workplace settings. Testimonies from survivors, likewise, claimed that many businesses had provided the repressive forces with personal information, photographs and lists of trade union activists and delegates who later disappeared.<sup>836</sup> Sixty-seven percent of disappearances were workers.<sup>837</sup> Similarly, the *Juntas Trial’s* in 1985 included a special mention of trade unionists and workers who

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The claimants were Víctor de Gennaro, Marta Olinda Maffei, Víctor Mendibil, Alberto José Piccinini, Juan Carlos Caamaño y Alberto Morlachetti.

<sup>834</sup> Basualdo, E., “The Legacy of the Dictatorship”, in Verbitsky, H and Bohoslavsky, JP. *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts, op. cit.*, p.89.

<sup>835</sup> Recalde, H. ‘Suppression of workers rights’, in Verbitsky, H and Bohoslavsky, JP. *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts, op. cit.*, p. 219.

<sup>836</sup> ‘Responsabilidad empresarial en delitos de lesa humanidad. Represión a los trabajadores durante el terrorismo de Estado’, *op.cit.*, p.3.

<sup>837</sup> Fernández, N., ‘24 de marzo de 1976, 25 años después’, *Revista Milenio*, no.5, Buenos Aires, 2001, p. 69.

experienced State repression. Many of the victims or their relatives reported that belonging to some type of trade union was known as one of the main causes of kidnapping, as well as the linkage between the loss of labour rights and the economic policies that transformed the Argentine economic structure.<sup>838</sup> The case of *Ford Motors Argentina* is very representative in this sense. Between March and May 1976, twenty-five workers were kidnapped, most of them members of the internal commission,<sup>839</sup> and the rest active unionists, who remained ‘disappeared’ for thirty to sixty days.<sup>840</sup> Similarly, in the *Ledesma* case, approximately twenty-six people were kidnapped between July 20 and 27, 1976, on power-cut nights that are remembered as the ‘Blackout Nights’.<sup>841</sup> Workers considered as ‘combative’ and/or those who fought for the recognition and guarantee of their labour rights, were the main targets of repression.

Labour lawyers too were an important target of repression. Carlos Alberto Moreno, for instance, was kidnapped and killed in Tandil between April and May 1977. His disappearance was mainly motivated by his role in successful court actions against the company *Loma Negra* in cases of occupational illnesses in which he represented workers.<sup>842</sup> Another relevant case was that of the lawyer Norberto Centeno, main author of the Employment Contract Act (*Ley de Contrato de Trabajo*). He was kidnapped on July 7, 1977 and later murdered by the State repressive forces.<sup>843</sup>

The national reorganization carried out by the dictatorship radically transformed the economic and social structure, severely attacked the source and level of workers'

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<sup>838</sup> ‘Responsabilidad empresarial en delitos de lesa humanidad. Represión a los trabajadores durante el terrorismo de Estado’, *op. cit.*, p.3.

<sup>839</sup> Internal commissions are rank-and-file representatives of workers, which played an important role in the defense of labour rights. For a synthesis of the history of delegates and internal commissions, see Azpiazu, D., Basualdo, V., and Schorr, M., *La industria y el sindicalismo de base en la Argentina*, Cara o Ceca, 2010.

<sup>840</sup> Basualdo, V., Ojea Quintana, T., and Varsky, C., ‘The Cases of Ford and Mercedes Benz’, in Verbitsky, H. and Bohoslavsky, JP. *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*, *op. cit.*, p.160.

<sup>841</sup> Dandan, A., and Franzki, H., ‘Between Historical Analysis and Legal Responsibility: The Ledesma Case’, in Verbitsky, H and Bohoslavsky, JP. *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*, *op. cit.*, p.187.

<sup>842</sup> The recurring illness in these cases was silicosis, caused by overexposure to crystalline silica, which came to be known on the South American continent through the development of mining activities, in particular in the Andean region, under the brutal forced labor systems of ‘mita’ and ‘yanaconazgo’ used in mining.

<sup>843</sup> For further information about these events, see Celesia, F., and Waisberg, P., *La noche de las corbatas. Cuando la dictadura silenció a los abogados de los trabajadores*, Aguilar, 2016.

incomes and their living conditions and reproduction. It also promoted the substantial alteration of the labour and union regime, the increase of the levels of exploitation, productive insecurity and pauperization.<sup>844</sup> While this repressive policy was extended to all economic activities, it mainly focused on industrial activities, including metalworkers and mechanics as two particularly persecuted guilds, and essential public services such as transport, rail, light and power. Those sectors had constituted key pillars of union organization. Likewise, basic representatives of workers such as delegates and members of internal commissions were the main object of repression.<sup>845</sup>

With regard to labour policies, the dictatorship promoted and implemented several laws aimed at legalizing repressive actions and government control in the sphere of union organization, which constituted a major turning point in the history of labour.<sup>846</sup> These laws were accompanied by the government's control over most of the large trade unions and federations, such as the CGT. Consequently, the centralized national structure of the labour movement was fractured. Disciplining organised workers was conceived as a necessary means for imposing a neoliberal economic plan. The working class and most combative unionists in particular, constituted thus one of the main targets of State repression, whereby the companies were leading beneficiaries of workers' disciplining and disappearances.

### **V.5. B Suppression of workers' rights and trade unions interventions**

Under the government of the Military Junta, workers lost most basic and fundamental labour rights that they had gained through hard struggles over the previous decades. With regard to specific labour legislation, the purpose was to discipline the working class and to spread fear so as to paralyze union activism. The means employed included dismissing workers, cracking down on labour activism and amending existing labour laws in favour of certain business sectors. Shortly after the coup, the

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<sup>844</sup> Basualdo, E. M., 'The Legacy of the Dictatorship: The New Pattern of Capital Accumulation, Deindustrialization, and the Decline of the Working Class, in, in Verbitsky, H. and Bohoslavsky, JP. *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts, op. cit.*, p.82-83.

<sup>845</sup> For decades, they had played a very important role in the defense of labor rights and in the organization and maintenance of conflicts and negotiations with the employers.

<sup>846</sup> Delich, F., 'Después del diluvio, la clase obrera', in Rouquié, A (comp.), *Argentina, hoy, Siglo XXI*, 1982, p.140.

constitutional right to strike was criminalized through the adoption of explicit State rules, such as the rule 21,400.<sup>847</sup> Similarly, the State rule 21.261 suspended the right to strike and any other labour action, stoppage, interruption or reduction of work or the performance of work that could affect production in any way. Furthermore, the Government took control of the Confederación General del Trabajo (CGT), the most representative labour confederation.

On March 29, 1976, the government adopted the State rule 21.274, on the dispensability of civil servants, which eliminated the possibility of compensation in case of dismissal for anyone who ‘may represent a real or potential factor of disturbance of the normal operation of the body they belong’.<sup>848</sup> One month later, the Employment Contract Act (Ley de Contrato de Trabajo, LCT), was amended by the State rule 21.297. Predictably, modifications and provisions removed important affected workers’ rights enshrined under the past democratic government. Some of the most relevant provisions removed by the military government included:

- The prevalence of uses and practices more favourable to workers or of company practices based on legislation, collective agreements, and employment contracts (sec. 17);
- The presumption of dismissal when there is proof that a work relationship existed and ceased (sec. 63);
- The obligation of informing workers of all personnel controls adopted by management (sec. 77);
- The requirement of regularly updating the adjustable minimum living wage based on the variations in the cost of living (sec. 120);
- The minimum wage for professionals (secs. 131 and 132);
- The requirement of submitting any decision concerning dismissals, suspensions, or contract modifications affecting several workers to a prior procedure and request for authorization, with participation of the union (sec. 276);

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<sup>847</sup> As noted by Professor Rodolfo Capón Filas, these should be referred to as ‘State rules’ or ‘de facto State rules’ but not as Laws as they were adopted without the legitimate process. See about this reflection Capón Filas, R., ‘Desde dónde, en dónde y para qué juzga el juez’, *IUSLabor* 4, 2005.

<sup>848</sup> Iramain, L.C., ‘La Política Laboral de la última Dictadura Cívico-Militar Argentina en el ámbito de las empresas públicas los casos de Entel, Gas del Estado y Ferrocarriles Argentinos (1976-1983)’, *Anuario IEHS* 29&30, 2014-2015, p.80.

In addition, the government also removed some important provisions, such as sections 243,<sup>849</sup> 244,<sup>850</sup> and 245<sup>851</sup> on the right to strike. Similarly, the application of the rule of *in dubio pro operario* was eliminated.<sup>852</sup> Accordingly, when evidence was not conclusive, the judge had no longer the obligation to decide in the most beneficial way for the worker.

The reforms also affected the companies' responsibility for outsourcing, a phenomenon that considerably increased during this period. For instance, the new regulation eliminated the main company as employer when the subcontractor corresponded to a specific activity of the company, establishing only the joint solidarity of the main company. Likewise, while the LCT established that all the companies' part of an economic group were jointly responsible for the obligations contracted by each of them with their workers and the social security agencies;<sup>853</sup> the new regulation limited that joint responsibility to cases that involved fraudulent operations or negligent management. This measure clearly benefited corporations gathered in economic groups.<sup>854</sup>

With the rule 22.425 the Private Bank Employee Statute and the Insurance Company Employee Statute, which contained gains for workers of the sector, were annulled. Business sectors benefited from the dissolution of the rule of law, particularly the financial and banking sector in this case. The reform also eliminated the right of workers to bring legal action for the re-establishment of any working conditions modified unilaterally by employers,<sup>855</sup> and the employers' prohibition to conduct surveys or inquiring about workers' political, religious, or labour views when hiring them, as well as the right of workers to freely express such opinions in the workplace,

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<sup>849</sup> It stipulated that strikes and other direct union actions only suspended the effects of the labour relation (but not extinguishing it), that a worker's participation in such actions was in no way cause for dismissal, and that not reinstating any portion of the workforce involved in a strike once it was lifted constituted unequal and discriminatory treatment.

<sup>850</sup> Section 244 prohibited employers from hiring workers to substitute or replace striking workers and from adopting disciplinary measures against them, or changing their situation or position in the company.

<sup>851</sup> Section 245 established the right of workers to receive compensation for days on strike when the strike was caused by a fault of the employer.

<sup>852</sup> Section 9. This provision was recovered in 2008 by Law 26,428.

<sup>853</sup> Section 33

<sup>854</sup> About companies' role on labour law see Recalde, H., *Una historia laboral jamás contada*, Corregidor, 2012.

<sup>855</sup> Section 71

provided such expression did not involve misconduct or interfere in the normal performance of their tasks.<sup>856</sup>

At the same time, State rule 21.270 eliminated trade union privileges enjoyed by union representatives and seized control of the CGT, the most representative labour confederation in Argentina. It also froze its funds, banks accounts and assets. On November 1979, the government adopted the Workers' Union Associations Act (*Ley de asociaciones Gremiales de Trabajadores*). This norm imposed important constraints to unions' effective exercise, such as setting geographic limits for federations and dissolving confederations. Furthermore, it banned unions from engaging in the operation and administration of healthcare programs or granting welfare benefits. Similarly, collective wage bargaining was banned by rule 21.307, so only the national Executive Branch was authorised to grant general pay rises. It may not be surprising thus that between 1976 and 1977 real wages fell by more than 40 percent.<sup>857</sup> Under State rule 21.371, the government ordered the suspension of all assemblies, congresses and election processes in trade unions. As Recalde highlighted, the dictatorship had the intention of prohibiting any space for social organization and reflection.<sup>858</sup>

## V. 6 Human Rights Violations

Since 1977, some European countries and the United States of America had been pressing Argentina's military government because of the international dimension of human rights violations, so credit management and military aid were particularly affected by that fact.<sup>859</sup> Initially, the leaders of the *Process* sought to deny those criticisms while completing the repressive strategy, in order to avoid sanctions that would damage their economic and geopolitical plans. To this end, they tried to convince the international community of the inevitability of certain consequences of what they

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<sup>856</sup> Section 81

<sup>857</sup> Basualdo, V., 'La clase trabajadora durante la última dictadura militar argentina', *op. cit.*, p. 6

<sup>858</sup> Recalde, H. 'Suppression of workers rights', in in Verbitsky, H and Bohoslavsky, J.P., *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*, *op. cit.*, p. 219.

<sup>859</sup> Argentina's Foreign Ministry received orders from fifty countries' abductees. Some of these claims, such as those posed by France, Sweden and the United States, involved strong diplomatic tensions. In these countries, organizations that brought together exiles, such as the Argentine Human Rights Commission (CADHU) and the Argentine Information and Solidarity Center (CAIS), received institutional and media support.



justified as *dirty war*<sup>860</sup> and of the biased character and politically motivated allegations of the families of the victims and human rights organizations.

On the other hand, the United Nations Commission on Human Rights echoed in mid-1976 allegations of disappearances,<sup>861</sup> unjustified detentions and torture that came through the ILO, UNESCO and exile groups.<sup>862</sup> Shortly before, the same agency had condemned South African *apartheid* and the Pinochet regime, which generated serious trade and financial problems in those countries.<sup>863</sup> Within this context, in 1978 Videla and the Vice-president of the United States, Walter Mondale, came to an agreement: the IACHR would visit Argentina, invited by the military government, to assess the country's human rights situation.<sup>864</sup> In return, the US government would support the management of *Eximbank* credits for 550 million dollars for the *Yacyretá* dam.<sup>865</sup> The invitation was formalised in December 1978. The Commission would only have the restriction of entering in military bases. In September 1979, the Commission arrived in Argentina. Composed of seven members, the commission remained in the country for two weeks. They visited prisons and cemeteries and they interviewed many detainees, who reported the inhumane treatment they received. Hundreds of unidentified graves were likewise recorded.<sup>866</sup> But surely the Commission's most significant task was the collection of several thousand direct testimonies of relatives of missing persons, which constituted the basis for their report. This had indeed been the gravest danger anticipated by military commanders. For this reason, repression against human rights organizations had been frequent during the previous months.<sup>867</sup> However, these efforts were not enough and thousands of people formed queues to report their experiences.

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<sup>860</sup> Videla started to use this expression during 1977 before the local and foreign press to legitimate the State repression. See Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática, op.cit.*, p.280.

<sup>861</sup> The Commission was replaced in 2006 by the Human Rights Council.

<sup>862</sup> Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática, op. cit.*, p.282

<sup>863</sup> *Ibid.*

<sup>864</sup> Previous requests had been rejected just few months before.

<sup>865</sup> Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática, op. cit.*, p. 290.

<sup>866</sup> *Ibid.* p. 296.

<sup>867</sup> In April, for example, secretary of the Association of Relatives of the Detained and Disappeared, Thelma Jara de Cabezas was kidnapped. Later, in August, several centres that collected Statements to present to the IACHR were raised.

Thus 5,580 complaints of disappearances were collected, which amply exceeded not only the government's calculations, but also those of the agencies themselves.<sup>868</sup>

The IACHR submitted its report in December 1979.<sup>869</sup> Its 374 pages contained a detailed analysis of clandestine repression and an assessment of kidnappings, torture and disappearances. Within its eleven chapters, it examined the political and legal system in Argentina and the whole spectrum of human rights violations committed under the regime. Namely, right to life, right to liberty, right to personal security, right to a fair trial and due process, freedom from opinion, expression and information, labour rights, political rights, religious freedom and worship and finally, the status of human rights organisations. As one of these work pillars are ESCRs, the following analysis is focused on the section related to labour rights, which is chapter VIII of the report. The first part of this chapter contains a few general considerations about the constitutional system in Argentina by that time. It pointed out, for instance, that the Constitution of Argentina recognised the right to work and the right to association for useful purposes. Similarly, it highlighted the system guarantees that unions may negotiate collective bargaining agreements, resort to conciliation and arbitration, and go out to strike. Then, the report described general restrictions of trade union and labour associations' rights adopted by the military government during its mandate. The Commission Stated that those measures have adversely affected trade union and labour organisations and restricted their constitutionally recognised rights. Amongst them, the report mentioned the following ones:

- i) Suspension by decree of union activities of labour, businessmen and professional organizations and the prohibition throughout the entire country of the activities of the organization known as '62 Organizaciones';
- ii) National suspension of the right to strike and of all other measures of force, work stoppage, interruption or slowdown of work or its performance on

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<sup>868</sup> Novaro, M., and Palermo, V., *La dictadura militar 1976/1983. Del golpe de estado a la restauración democrática, op.cit.*, p.296.

<sup>869</sup> IACHR Report on the situation of human rights in Argentina. OEA/Ser.L/V/II.49. Doc. 19 corr.1. The Original version is in Spanish, available at <http://www.cidh.org/countryrep/argentina80sp/indice.htm>. English version available at <http://www.cidh.org/countryrep/Argentina80eng/toc.htm> accessed 3 May 2018.

conditions that affect production by workers, businessmen and their respective organizations, with the imposition of penalties and procedures to apply in furtherance of the regulatory standards of the national security system;

iii) The dissolution and declaration of illegality of several labour unions which involved revoking their legal personality, closing their bank accounts and incorporating their assets and stock into the patrimony of the State;

iv) Extension to the Executive branch of the power of suspending all direct action methods by either employers or workers such as lock-out, work stoppage or slowdown, and the imposition of a prison sentence of up to 10 years, as well as the loss of the workers' remuneration. Workers may be suspended without indemnity, or their individual work contracts declared null and void, if they are placed at the disposition of the Executive, either with or without legal protection of labour rights.<sup>870</sup>

With regard to the trade unions situation, the report Stated that the government also ignored its international obligations, accepted by Argentina as a member of the International Labour Organization. It expressly named the obligation of recognizing and maintaining certain protective measures and benefits for workers in general and a special group in particular. The report also highlighted the relevance of the government disregard for ILO Conventions 87 (Freedom of Association and Protection of the Right to Organise Convention) and 98 (Right to Organise and Collective Bargaining Convention).<sup>871</sup> They were both ratified by Argentina in 1960 and 1956, respectively. Furthermore, the report affirmed that several international organizations<sup>872</sup> 'have conducted investigations which have produced evidence of repression of the organized labor sector and their activities, and the promulgation of a number of provisions that weakened the broad system of protection for workers that existed in Argentina before the military takeover which violated the rights and benefits acquired under the Constitution and existing laws.' Similarly, it reflected the testimonies from some

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<sup>870</sup> IACHR Report on the situation of human rights in Argentina. Chapter VIII. Rights of labour. B) Restriction of Trade Union and Labour Association Rights, para. 2

<sup>871</sup> *Ibid.* Chapter VIII. Rights of labour. C.)The trade union situation, para.2

<sup>872</sup> Such as the Trade Union Committee of the International Labor Organization.

victims who ‘corroborated the reports received on the circumstances of their detention and the activities that each performed in the trade union or labour union to which they belong’.<sup>873</sup>

In its conclusions, the report contended that according to the American Declaration of the Rights and Duties of Man, violations of human rights had been committed. In particular, the report also highlighted that ‘labour rights have been affected by the norms which have been decreed in this area and by their application, which has had a particular impact on the right of trade union association, due to military interference, and the promulgation of laws which injure the rights of the working class’.<sup>874</sup> Similarly, it Stated that the right of trade union associations was particularly affected and it pointed out the promulgation of laws that injure the rights of the working class.

It is worth mentioning that the report divided its conclusions into two categories, locating labour rights on a second level. Presumably, they wanted to highlight the relevance of CPRs violations, such as the right to life, as basic rights in contrast to labour rights, which being part of ESCRs, have been traditionally considered as second generation rights and thus, not as essential as the previous ones. In addition, with this categorization, the Commission may have wanted to emphasise the seriousness of the violations that related to physical integrity, which was the HRO’s main claim by that time. For the first category, the Commission noted that ‘numerous serious violations of fundamental human rights, as recognized in the American Declaration of the Rights and Duties of Man, were committed’<sup>875</sup> in which the report included ‘the right to life’, ‘the right to personal freedom’, ‘the right to personal integrity and security’, and ‘the right to a fair trial and due process’.<sup>876</sup>

By contrast, regarding the second level, the Commission noted that ‘with regard to other rights established in the American Declaration of the Rights and Duties of Man, the Commission notes that while the failure to observe them does not assume the same

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<sup>873</sup> Testimonies from Alfredo Bravo, Eduardo Jozami, Carlos Enrique Correa Gutiérrez, Diego Sebastián Ibáñez and Alberto Piccinini, who were in detention centres. Lorenzo Miguel was under house arrest.

<sup>874</sup> Conclusions and Recommendations, A) Conclusions, para. 2, b.

<sup>875</sup> Conclusions and Recommendations, A) Conclusions, para.1.

<sup>876</sup> *Ibid.*

gravity of the previous cases, the limitations to which they are subject also affect the total protection of human rights in Argentina'.<sup>877</sup> Within this category fell, together with 'labour rights', 'freedom of opinion, expression and information', 'political rights', and 'freedom of religion and worship'.<sup>878</sup>

The report concluded with some specific recommendations. In the field of labour rights, it recommended to 'take the necessary measures to ensure their actual observance, and as regards the right of trade union association, to guarantee the rights of workers' organizations, repealing, or, where appropriate, amending, laws that prevent their normal development'.<sup>879</sup> Finally, the Commission observed that subsequent to its visit to Argentina, violations of the right to life, liberty, personal integrity and security and of the right to a fair trial and due process had decreased, and that particularly since October 1979, no denunciations had been submitted with respect to further disappearances of persons.

Human rights violations under the military regime took an international dimension after the visit of the IACHR and the dissemination of its report. Denial was no longer a sustainable position for military authorities. Instead, responsibility emerged and was clear to view by the International community.

## **V.7 Intermediate conclusions**

This chapter has examined the historical and socio-political context of the last dictatorship in Argentina. It generally describes the economic and social policies implemented by the military government, as well as providing some insights about how State repression was developed. It contends that specific companies and economic groups had a major role under the regime and illustrates how they directly benefited from State repression, which led many commentators to refer to the regime as a civic-military dictatorship.

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<sup>877</sup> Conclusions and Recommendations, A) Conclusions, para. 2.

<sup>878</sup> *Ibid.*

<sup>879</sup> Conclusions and Recommendations, B) Recommendations, para. 12.

While forced disappearances were the main methodology of repression, it has been contended that a variety of human rights were violated, not only in the civil and political sphere but also notably in the field of socioeconomic and cultural rights. Labour rights, such as the right to form and join trade unions, were also constantly violated, workers and trade union representatives being also one of the main targets of physical repression. Consequently, labour and social relations were profoundly influenced by those policies and State repression, which significantly affected the configuration of the Argentinian society. Chapter 6 will provide a legal analysis of the transitional justice process in Argentina, particularly considering how ESCRs and corporate involvement in human rights violations have been dealt with within the existing transitional justice mechanisms.

## VI. CHAPTER 6 - *Nunca Más*: The transitional justice process in Argentina

### VI. 1. Introduction

The loss of the Falklands War in June 1982 was the beginning of the end of the last Argentinian dictatorship. While it was not this event in itself that defined the fall of the regime, it has been suggested that it acted as ‘the catalyst of a pre-existing situation’.<sup>880</sup> Already in 1978, the Military Junta understood that the fight against – and their victory over – subversion was completed. Thus, efforts were focused then on designing and implementing the future political order in which they would keep a leading role.<sup>881</sup> Certainly, the regime wanted to guarantee that future scrutiny of violent repression was avoided,<sup>882</sup> but that was not an easy task. Internal division about economic plans and nationwide dissatisfaction was added to the questioning of government legitimacy related to accusations of human rights violations. In this unstable context, President Galtieri took the decision of invading the Falklands in April 1982,<sup>883</sup> which ended in disaster.<sup>884</sup> Transition to democracy then began with the collapse of the military government.

Shortly after the war, political parties started to recover their right to function. In July 1982, *Multipartidaria* – which included five parties–,<sup>885</sup> was created to devise a transitional programme to be agreed on by civilian and military leaders.<sup>886</sup> In October 1983, national elections saw the victory of Radical Party candidate Raúl Alfonsín. During the election campaign, Alfonsín insistently claimed his desire to re-establish the

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<sup>880</sup> Lessa, F., *The Missing Memory of Transitional Justice: How Argentina and Uruguay confronted past evils, 1983-2009.*, *op. cit.*, p. 146. For a further analysis about the end of the dictatorship see Pion-Berlin, D., ‘The Fall of Military Rule in Argentina: 1976-1983’, *Journal of Interamerican Studies and World Affairs*, vol. 27, no. 2, 1985, pp. 55-76.

<sup>881</sup> González-Bombal, I., ‘El dialogo político: la transición que no fue’, *Documento CEDES*, 1991, p. 2.

<sup>882</sup> Acuña, C. H., and Smulovitz, C., ‘¿Ni olvido ni perdón? Derechos humanos y tensiones civico-militares en la transición argentina’, *Documento CEDES*, 1991, p. 27.

<sup>883</sup> The invasion of the Falklands has been considered as one last attempt to regain legitimacy while encouraging patriotic feeling and resolving the increasing political and social unrest.

<sup>884</sup> Further information about the Falklands conflict in Alonso Piñero, A., *Historia de La Guerra de las Malvinas*, Planeta, 1992.

<sup>885</sup> As the Peronist and Radical party.

<sup>886</sup> González-Bombal, I., ‘El dialogo político: la transición que no fue’, *op.cit.* p. 97.

rule of law, and his commitment to investigate the truth and provide justice with regard to past atrocities.<sup>887</sup> Later democratic governments would take different positions regarding accountability for past human rights violations, including amnesties, criminal trials and symbolic reparation initiatives. It should be generally noted that, by the time that Argentina was emerging from authoritarianism, human rights concerns were not a priority on the international political agenda. In fact, it was not until the end of the Cold War when these issues raised awareness internationally, that the Argentinian transitional justice process would be influenced.

This chapter analyses the different political stages and mechanisms implemented in the transitional justice process in Argentina, since the first democratic government in 1983 to date. While the main and earliest attention was given to disappearances, this chapter aims to examine how the transitional justice process dealt with violations of ESCRs, particularly with those related to labour rights which were remarkably violated, as noted in the previous chapter. Likewise only recently has attention been paid to the major role that corporations and economic groups played in State repression. Therefore, this chapter aims to provide an assessment of the transitional justice mechanisms developed to address corporate accountability for human rights abuses in post-dictatorship Argentina.

## **VI. 2. Political stages of the transitional justice process in Argentina**

The Argentinian transitional justice process has been later classified in three different phases.<sup>888</sup> The first one, under Alfonsín's government, confronted past human rights violations in a limited way while largely employing the 'Theory of the Two

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<sup>887</sup> While the Peronist Candidate Ítalo Lúder had argued that he would respect the amnesty law enacted by the outgoing junta, Alfonsín, on the contrary, promised to investigate human rights violations.

<sup>888</sup> See for instance, *Pereira, G., and Engstrom, P.*, 'From Amnesty to Accountability. The Ebbs and Flows in the Search for Justice in Argentina', in Payne, L.A. and Lessa, F. (eds.), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, Cambridge University Press, 2012, pp. 97- 122.; Lichtenfeld, R., 'Accountability in Argentina. 20 Years Later, Transitional Justice Maintains Momentum', Report of the International Center for Transitional Justice, Case studies Series, pp.1-10; Lessa, F., *The Missing Memory of Transitional Justice: How Argentina and Uruguay confronted past evils, 1983-2009.*, *op. cit.*, p.156. This work, however, identified and added a fourth phase that will be denominated 'current stage and challenges', which started in 2015 with Macri's government and it has lasted to date.



Demons'.<sup>889</sup> In a second stage, however, oblivion and institutional pardons were the rule with regard to human rights abuses. In the background, human rights organisations constantly worked to fight against impunity. It was not until the beginning of the 21<sup>st</sup> century that accountability policies and initiatives returned to the political and social scene. However, the trend started to change in 2015, coinciding with the election of Mauricio Macri as President of the Republic, as will be further analysed below.

### **VI.2.A. First period – New democratic governments and first accountability initiatives (1983-1989)**

First democratic elections after the dictatorship were won by the candidate who had demonstrated a greater commitment to human rights. Indeed, human rights concerns were a fundamental part of Alfonsín's electoral campaign. He argued that Argentina could not achieve a full recovery without responding to the past crimes. Alfonsín also highlighted that 'new foundations for an authentic democratic system' needed to be established.<sup>890</sup> Consequently, the issue of confronting past violations was high on the new government's agenda. However, only just over fifteen months had passed between the defeat in the Falklands War in June 1982 and the take-over of Alfonsín in December 1983. Military forces were still quite powerful by that time and were certainly leading the *new* process of democratisation. Indeed, Agüero noted that politicians were 'unable and somewhat unwilling to press for a speedy transfer of power'. Instead, opposition to the regime supported the last junta of General Bignone which implemented a limited and beneficial military removal from power.<sup>891</sup>

Shortly after his election, Alfonsín set up *La Comisión Nacional Sobre la Desaparición de Personas* (National Commission on Disappeared Persons,

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<sup>889</sup> In essence, The Theory of the Two Demons morally equates violent left-wing political groups with illegal repressive activities carried out by the State and appeals to a 'national reconciliation' need to 'forgive and forget'. Alfonsín's administration used this theory to explain what happened under the dictatorship from a sociological point of view, and to define accountability policies afterwards. Further analysis can be found on Franco, M., "La teoría de los dos demonios": un símbolo de la posdictadura en la Argentina', *A Contra Corriente, Una revista de Historia Social y literatura de América Latina*, vol. 11, no. 2, 2014, pp. 22-52.; or Martín, L., 'On Innocent Victims and Demons in Argentina (1983-1985)', *African Yearbook of Rhetoric*, vol. 3, 2012, pp. 65-75.

<sup>890</sup> Alfonsín, R., 'Never Again' in Argentina', *Journal of Democracy*, vol. 4, no. 1, 1993, p. 15.

<sup>891</sup> Agüero, F., 'Legacies of Transition: Institutionalisation, the Military, and Democracy in South America', *Mershon International Studies Review*, vol. 42, n° 2, 1998, p. 390.

CONADEP).<sup>892</sup> The Argentinian Truth Commission took its first steps within a context of political tension. It faced the frontal opposition by military forces that defended the fight against subversion and consequently justified State repression. Similarly, it was also questioned by some human rights organisations which saw this initiative with scepticism as they requested instead a bicameral parliamentary commission to investigate human rights abuses.<sup>893</sup> However, they generally cooperated with the Commission. CONADEP's mandate was mainly to investigate and to shed light on the *disappearances* ('desaparecidos'), which certainly also reflected what was the main method of repression. The Commission was also mandated to receive denunciations and evidence and to facilitate them to judicial bodies, locate abducted children, report any attempt to conceal or destroy evidence and submit a final report within 180 days.<sup>894</sup> In 1984, the Truth Commission released its final report, known as *Nunca Más* (Never Again).<sup>895</sup> The Commission received 7,000 testimonies and documented 8,961 cases of enforced disappearance, as well as proving the existence of 340 clandestine detention centres.<sup>896</sup> The report stated that forced disappearances should be considered a crime against humanity and recommended that judicial process were needed.<sup>897</sup> It also highlighted the need to provide financial and social assistance to victims' relatives.

The prologue to the 1984 CONADEP final report reflected the 'Theory of the Two Demons', stating that 'during the decade of the 1970s Argentina was torn by terror that was coming as much from the extreme right as from the extreme left [...]' and adding that 'The armed forces responded to the terrorists' crimes with a terrorism far worse than the one they were combating, and after 24 March 1976 they could count on the power and impunity of an absolute State, which they misused to abduct, torture and kill thousands of human beings.' This theory was the Alfonsín's government main

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<sup>892</sup> It was created by Presidential Decree 187.

<sup>893</sup> Hayner, P., *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, Routledge, 2011, pp. 64-65.

<sup>894</sup> *Ibid.* p.56.

<sup>895</sup> CONADEP Final Report, 'Nunca Más'. Original Spanish version available at <http://www.desaparecidos.org/arg/conadep/nuncamas/nuncamas.html>; English version available at [http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain\\_001.htm](http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm) accessed 6 May 2018.

<sup>896</sup> Crenzel, E., 'Políticas de la memoria. La historia del informe *Nunca Más*', *Papeles del CEIC*, no. 61, 2010, p.15.

<sup>897</sup> For instance, in the Prologue and Chapter VI (Recommendations)

interpretation of the conflict.<sup>898</sup> However, the 2006 edition of the CONADEP report included a new prologue, written by the Human Rights Secretariat at the request of then-president Néstor Kirchner, denouncing and refuting the one made before based on this theory.<sup>899</sup>

While CONADEP played an important role in promoting domestic accountability, human rights organisations did not fully support it from the beginning, as they demanded greater efforts to investigate State repression.<sup>900</sup> In an effort to achieve this, they created in August 1984 a Technical Commission for Data Collection to share their archives. Furthermore, as CONADEP's mandate was limited to truth-telling, human rights organisations also began building criminal cases against perpetrators on a case-by-case basis.

On the other hand, armed forces were completely against any initiative which involved confronting past State repression. Already in April 1983, the regime adopted the 'Final Report on the War against Subversion and Terrorism'<sup>901</sup> in which it was stated that the 1975 constitutional government had authorised the *war* against subversion and that all the disappeared were either terrorists or had gone into exile. Similarly, in March 1983, they adopted the so-called 'Law of National Pacification'<sup>902</sup> which was in fact a self-amnesty benefiting both armed groups and the armed forces, covering the crimes committed between May 1973 and June 1982. Finally, Decree 2726/83 ordered the destruction of all documents relating to the State repression. However, human rights groups immediately reacted against those actions, and particularly against the self-amnesty. On September 27, 1983, the Buenos Aires Lawyers' Association filed a suit in a federal court, claiming that an unconstitutional

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<sup>898</sup> See supra note 889.

<sup>899</sup> The new version of the prologue contended that State repression was developed by the Military Juntas 'when there were no strategic security challenges for the *status quo*, because the guerrillas had already been defeated militarily' – author's own translation. The original text says 'el terrorismo de Estado fue desencadenado de manera masiva y sistemática por la Junta Militar a partir del 24 de marzo de 1976, cuando no existían desafíos estratégicos de seguridad para el *statu quo*, porque la guerrilla ya había sido derrotada militarmente'. Prólogo del Nunca Más, Edición del 30 Aniversario del Golpe de Estado, 2006, p.2. Document available in Spanish at: [http://www.desaparecidos.org/nuncamas/web/investig/articulo/nmas2006/Prologo\\_2006.pdf](http://www.desaparecidos.org/nuncamas/web/investig/articulo/nmas2006/Prologo_2006.pdf) accessed 6 May 2018.

<sup>900</sup> See supra note 893.

<sup>901</sup> 'Documento Final de la Junta Militar sobre la guerra contra la subversión y el terrorismo'

<sup>902</sup> Law no. 22.924, 'Ley de Pacificación Nacional', 23 of March 1983.

government had no authority to declare an amnesty. The court declared that the self-amnesty was ‘a flagrant violation of the law’ and declared it ‘null and void’.<sup>903</sup> As pointed out by Garro and Dahl, the self-amnesty was ‘a major legal obstacle to the prosecutions’<sup>904</sup> as criminal laws cannot be abrogated retroactively under Argentinian criminal law, and if a law is modified after a criminal act, the most beneficial law should be applied, which in this case would be the amnesty laws.<sup>905</sup> The self-amnesty was finally declared unconstitutional and null and void also by the Argentina Congress in December 1983. Consequently, the Congress removed the main obstacle to prosecuting crimes committed during the civic-military dictatorship.

Later that month, Alfonsín sent a bill to the Congress devising the legal structure of the prosecutions. The bill proposed the top military leaders in the repressive apparatus –those who planned, controlled and organised State repression- to be punished.<sup>906</sup> Alfonsín sought to distinguish therefore between the armed forces as an institution which needed an internal reform and the individual military officers who had committed serious crimes that required punishment.<sup>907</sup> All nine members of the three military juntas were then successfully prosecuted. The trial, known as *Juntas’ Trial*, started in April 1985 and lasted for eight months. Charges were under the existing Argentine criminal code: unlawful deprivation of liberty, torture, theft, and murder, committed against 711 victims, which actually represented less than eight percent of the total disappearances recorded by CONADEP.<sup>908</sup> While Massera and Videla were sentenced to life imprisonment, Viola, Lambruschini and Agosti were sentenced to seventeen, eight and four and a half years respectively. However, the other four defendants were acquitted, as the court considered that there was not enough specific evidence with regard to their time in charge. These trials were crucial as they opened an *era* of accountability and led to investigations of a large number of people in other courts. But military pressure and unrest grew, which led the government to introduce

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<sup>903</sup> Garro, A.M. and Dahl, E., ‘Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward’, *Human Rights Law Journal*, vol. 8, 1987, p. 305.

<sup>904</sup> *Ibid.* pp. 305-306

<sup>905</sup> *Ibid.*

<sup>906</sup> The trials were eventually held in a civilian appeals court.

<sup>907</sup> Pereira, G., and Engstrom, P., ‘From Amnesty to Accountability’, in L. A. Payne and Lessa, F., *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, Cambridge University Press, 2012, p.6.

<sup>908</sup> Crenzel, E., *Memory of the Argentina Disappearances: The Political History of Nunca Más*, Routledge, 2012, p. 103

two laws to abort the ongoing trials of alleged perpetrators. The infamous so-called 'Full Stop' and 'Due Obedience' laws effectively granted impunity to perpetrators.

The first one, adopted in December 1986, established a 60-day deadline for summoning alleged human rights offenders. Otherwise, the case would be extinguished after 22 February 1987. Its adoption, however, had a boomerang effect, triggering judicial activity and almost 500 new cases were filed.<sup>909</sup> In June 1987, the government enacted the 'Due Obedience Law', which hindered prosecutions establishing the legality of the chain of command.<sup>910</sup> According to this law, only the highest military ranks could be held responsible for human rights abuses committed under State repression, as they were in charge of those operations. Thus, other participants would not be able to be prosecuted as their involvement was limited to following their superiors' commands. As Lessa noted, despite their elegant wording, these two Laws constituted amnesty 'under cover' and were forcefully rejected by human rights activists.<sup>911</sup>

First State reparation laws for human rights violations were approved during those years and they partially followed CONADEP recommendations.<sup>912</sup> They mainly restored labour rights for blacklisted workers, annulled spurious administrative actions and judicial processes against victims. They also compensated economically with pensions and medical coverage to spouses and dependent children of disappearances.<sup>913</sup>

Alfonsín was forced to resign in July 1989, six months ahead of schedule, mainly because of the economic crisis and social instability. By that time, his government was weakened by continuous clashes with military forces, who also

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<sup>909</sup> For a further analysis on that, see Roniger, L., 'Paths of Citizenship and the Legacy of Human Rights Violations: The Cases of Redemocratised Argentina and Uruguay', *Journal of Historical Sociology*, vol. 10, no. 3, 1997, pp. 270-309.

<sup>910</sup> However, rape, economic crimes and disappearance or identity forgery of minors were not covered by that law.

<sup>911</sup> Lessa, F., 'Nunca Más. The Politics of Transitional Justice in Argentina and Uruguay 1983 – 2010', *FB38 – Transitional Justice and Human Rights*, ISA Convention 2011, p. 16.

<sup>912</sup> Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', in De Greiff, P., *The Handbook of Reparations*, Oxford University Press, 2006, p. 22.

<sup>913</sup> *Ibid.* pp.23-27.

frequently questioned the links between left-wing terrorism and human rights organisations.<sup>914</sup>

### **VI.2.B. Second period- Amnesty and Pardons (1989-2003)**

The newly-elected President was the Peronist Carlos Menem (1989-1999), who unequivocally tried to avoid the confrontations of the violent past. Menem's government promoted a 'forgive-and-forget policy', in which the pardons were considered necessary to restore the faith of the armed forces in the government.<sup>915</sup>

President Menem enacted two sets of presidential pardons that reversed most of the advances achieved under the previous Alfonsín administration, and whose main consequence was a situation of impunity. Those pardons were granted to members of the military juntas convicted in the Juntas Trial, to a few high-ranking military officials whose trials were still underway and to some *guerrilla* leaders who were being prosecuted.<sup>916</sup> Although trials continued and pardons could not invalidate crimes committed, it suspended the punishment.<sup>917</sup> While it has been estimated that 70% to 80% of the population did not endorse this policy of pardons, Menem's government did not encounter great opposition from within the political and institutional system.<sup>918</sup>

In line with the above-mentioned policy, Menem's first mandate (1989-1994) only faced challenges related to the violent past with regard to economic reparations and illegally appropriated children. The government adopted a comprehensive policy of economic reparations in compliance with the 1992 report of the IACHR,<sup>919</sup> which

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<sup>914</sup> Lessa, F., *The Missing Memory of Transitional Justice: How Argentina and Uruguay confronted past evils, 1983-2009*, *op. cit.*, p.168.

<sup>915</sup> Lessa, F., 'Nunca Más. The Politics of Transitional Justice in Argentina and Uruguay 1983 – 2010', *op. cit.*, p. 22.

<sup>916</sup> Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, p. 27.

<sup>917</sup> For a further analysis about the impact of amnesties see González-Bombal, I., '“Nunca Más”: El Juicio más allá de los Estrados', in Acuña, H.C., (Ed.), *Juicio, castigos y memorias: derechos humanos y justicia en la política Argentina, Ediciones Nueva Visión, 1995*, pp. 194-216.

<sup>918</sup> Lessa, F., *The Missing Memory of Transitional Justice: How Argentina and Uruguay confronted past evils, 1983-2009*, *op. cit.*, p.179.

<sup>919</sup> IACHR, Report Num. 28/92, cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311. Argentina issued on October 2, 1992. Published in the Annual Report by the IACHR 1992-1993;

recommended the Argentinian government to economically redress human rights violations.<sup>920</sup> Initially, economic compensation had to be paid to victims of illegitimate detentions.<sup>921</sup> At a later stage, Law 24.411 of 1994 provided for a sum of USD 224.000 to be paid to the lawful heirs of those who had disappeared or died because of the political repression. Finally, also in 1994, Law 24.321 of Absence by Forced Disappearance (*Ausencia por Desaparición forzosa*) created an unprecedented legal status to solve legal obstacles faced by the victims' relatives of the disappeared.<sup>922</sup>

The issue of economic reparations caused disagreements between and within human rights groups, particularly within Mothers of Plaza de Mayo, which separated into two factions in 1986.<sup>923</sup> *Asociación-Madres* have been the only organisation which is categorically opposed to any policy of reparations, whether it involves either a monetary payment or an act of public recognition, such as an official apology.<sup>924</sup>

The government also directly supported the search for missing children, appropriated by the regime through a network of illegal adoptions. In 1992, the National Commission for the Right to Identity (CONADI) was created to work jointly with the National Bank of Genetic Data, established in 1987. However, main initiatives in this sense have been carried out by the association *Abuelas*, a human rights group set up in 1977 to identify and reunite missing grandchildren (*nietos*) with their biological families. As child stealing was not covered by the Due Obedience Law, *Abuelas* was able to initiate prosecutions for these crimes. *Abuelas* estimates that approximately 500 children were illegally appropriated during the dictatorship, of which 127 have so far

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OEA/Ser.L/V/II.83; Doc.14, March 12, 1993. Original document available in Spanish at: <http://www.oas.org> accessed 8 May 2018.

<sup>920</sup> Victims of State terrorism had resorted to the IACHR to denounce Alfonsín's 'Full Stop' and 'Due Obedience' laws and Menem's presidential pardons. The IACHR confirmed that those initiatives violated the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

<sup>921</sup> Also with Decree 70/31, both norms of 1991.

<sup>922</sup> Lessa, F., *Memory and Transitional Justice in Argentina and Uruguay. Against impunity*, Palgrave MacMillan, 2013, p. 61-62.

<sup>923</sup> *Asociación-Madres* and *Madres de Plaza de Mayo-Línea Fundadora*.

<sup>924</sup> The rest of the human rights organisations have supported the adoption of reparation policies and they have advocated to achieve legislation reforms in this sense. See Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, p. 25.

recovered their true identity.<sup>925</sup> It is worth noting here that since the 1994 Constitutional reform in Argentina, international public law is directly incorporated in domestic legislation. Thus, articles 7 and 8 of the UN Convention on the Rights of the Child have served as legal basis to order blood tests to establish the true identity of people who have doubts about their true biological background.<sup>926</sup>

In a landmark decision in October 1998, former generals Videla, Massera, Nicolaidis and Bignone, and five lower-ranking officers, were charged and jailed for 194 counts of illegal abduction and adoption of children in seven clandestine centres, leading to the first imprisonments of the 1990s. Unsolved cases of missing children are considered as ‘ongoing crimes’. Forgery of official documents, which contain essential details about the victims’ true identity and origin, has not been overcome.<sup>927</sup>

Concerns about the violent past reemerged during Menem’s second mandate (1995-1999). This renewed interest was mainly due to the momentum and perseverance of human rights organisations. After Scilingo’s confession in 1995 about the death flights,<sup>928</sup> human rights activists fostered and pioneered the so-called right to truth, relying on the idea that, while the amnesty laws blocked criminal proceedings, family members still had the right to know the truth about their loved ones and society had the right to know how State terrorism had operated.<sup>929</sup> This argument was in line with the

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<sup>925</sup> Data at May, 2018. Available at <https://www.abuelas.org.ar/caso/buscar?tipo=3> accessed 10 May 2018.

<sup>926</sup> Article 7: 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be Stateless.

Article 8: 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

<sup>927</sup> Particularly concerning practical problems to identify abducted children.

<sup>928</sup> In March 1995, former Navy Captain Adolfo Scilingo broke the military ‘pact of silence’. He publicly confessed to having participated in two ‘death flights’, throwing thirty people (alive but drugged) into the Río de la Plata and open seas. While survivors and human rights organisations had been denouncing these practices all along, it was not until that moment when people started to realize and believe that they actually took place as part of State repression. See about this topic Verbitsky, H., *El vuelo*, Planeta. Espejo de la Argentina, 1995.

<sup>929</sup> Lessa, F., ‘Nunca Más. The Politics of Transitional Justice in Argentina and Uruguay 1983 – 2010’, *op. cit.*, p.24.



1992 IACHR's report, which declared the *Full Stop* and *Due Obedience* laws incompatible with international human rights law, and recommended that Argentina adopt measures to clarify the facts of State terrorism.

Founding members of CELS (Centro de Estudios Legales y Sociales),<sup>930</sup> Emilio Mignone and Carmen Lapacó, began the first 'right to truth' actions before domestic courts, but the Supreme Court denied their claims invoking the presidential pardons in an attempt to close the option on future actions of this nature.<sup>931</sup> Human rights groups therefore resorted to the Inter-American system. In the Lapacó case, submitted in 1998, a friendly settlement was reached in 1999 by which Argentina agreed to accept and guarantee the right to truth, and exhaust all means to obtain information on the fate of the forced disappeared.<sup>932</sup> As a result, truth trials have been ongoing throughout the country, and especially in big cities such as Buenos Aires, Córdoba and La Plata. While truth trials are not real trials -there is no judgement, nor defendants- their role in gathering information and testimonies has been essential, particularly since 2006 when judicial proceedings re-opened, as we will analyse in the next section.<sup>933</sup>

Human rights groups were also fundamental with regard to the end of the impunity period. While the Chamber of Deputies had derogated the amnesty laws in March 1998 -and thus prevented their future application- their effects remained with regard to past judicial proceedings. In this sense, the CELS demanded the unconstitutionality of amnesty laws, developing a pioneering legal argument based on one case of illegal child appropriation.<sup>934</sup> The organisation pointed to a fundamental contradiction in the judicial system as the laws allow to find people criminally responsible for kidnapping a child and falsely changing the identity, but not for the original crime of the murder and disappearance of the parents, which later gave rise to the crime of kidnapping. As a result, in March 2001, Federal judge Cavallo declared the

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<sup>930</sup> CELS is a human rights organization created in 1979. More information about them can be found in their website <https://www.cels.org.ar/web/presentacion/> accessed 8 May 2018.

<sup>931</sup> Pereira, G., and Engstrom, P., 'From Amnesty to Accountability. The Ebbs and Flows in the Search for Justice in Argentina', in Payne, L.A. and Lessa, F. (eds.), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, *op. cit.*, p. 110.

<sup>932</sup> IACHR, *Carmen Aguiar de Lapacó v. Argentina*, Report No. 21/00, Case 12.059.

<sup>933</sup> A further analysis about truth trials will be done in the next section when analysing the transitional justice process and mechanisms implemented in Argentina.

<sup>934</sup> It was the Claudia Poblete case, daughter of José Poblete and Getrudis Hlaczik, who had disappeared in November 1978, a case opened by Abuelas in 1998.

unconstitutionality of the amnesty laws, for violating the Constitution and international obligations.<sup>935</sup> Just a few days following Cavallo's ruling, IACHR published its judgment in *Barrios Altos* declaring invalid, *inter alia*, the amnesty laws passed by the Fujimori government in Peru.<sup>936</sup>

As mentioned before, human rights concerns were not a priority on the international political agenda until the end of the Cold War. Since then, in the case of Argentina, judicial proceedings abroad were important landmarks in the fight for accountability. Relatives of French, German and Italian victims initiated criminal prosecutions in their home countries. In Spain, for instance, the principle of universal jurisdiction offered a basis for those prosecutions,<sup>937</sup> which eventually resulted in the arrest of former Chilean dictator Augusto Pinochet in London in 1998. This case motivated human rights organisations to initiate similar proceedings against those involved in torture and crimes against humanity in Argentina.<sup>938</sup>

The newly-elected President in 1999 was the radical Fernando De la Rúa (1999-2001). Although he had promised cooperation on human rights concerns during the electoral campaign, he also placed obstacles for accountability. His government refused any extradition request for Argentinian military officers investigated abroad under universal jurisdiction. Indeed, De la Rúa adopted the Decree 1.581 in 2001 to reject all extradition requests relating to events that had occurred on national territory or territory under national jurisdiction. De la Rúa resigned during the economic, social and political crisis in 2001.<sup>939</sup> During the subsequent period of crisis (from the end of 2001 to 2003),

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<sup>935</sup> The case is known as Simón Case. Julio Simón was a police officer during the military regime and indicted for his involvement in the detention of Claudia Poblete's parents, as well as the appropriation of their child at a secret detention centre (the 'Olimpo'). This first-instance decision, however, only applied to the Poblete case because federal judges cannot declare the unconstitutionality for all cases.

<sup>936</sup> IACHR, Judgment in Chumbipuma Aguirre and Others (Peru), March 14, 2001.

<sup>937</sup> See for instance, Rojo, E., 'National legislation providing for the prosecution and punishment of international crimes in Spain', *Journal of International Criminal Justice*, vol. 9, issue 3, 2011, pp. 699-728.

<sup>938</sup> Kaleck, W., 'International Criminal Law and Transnational Business. Cases from Argentina and Colombia', in Michalowski, S. (ed), *Corporate Accountability in the Context of Transitional Justice*, *op. cit.*, p. 181.

<sup>939</sup> About this period see Ferreira Rubio, D.M., '¿Qué se vayan todos!': la crisis argentina de 2001 – 2003', Seminario Internacional Gobernabilidad y Reformas Políticas. Nuevos desafíos para la democracia, Guatemala, 22-23 November, 2005.

several presidents were designated by Congress.<sup>940</sup> Economic crisis and social and political unrest temporarily overshadowed the past human rights violations and the search for accountability.

### **VI.2.C. Third period –New Accountability Era (2003-2015)**

In May 2003, the Peronist Néstor Kirchner was elected as the new President (2003-2007). Unlike previous administrations, his government was characterised by the adoption of a very strong pro-accountability policy which would continue with his wife Cristina (2007-2015). As Lessa noted, Kirchner's human rights work focused on four areas: the recovery and rehabilitation of former clandestine detention centres into memory spaces; the removal from governmental positions of individuals linked to the dictatorship, and vetting and purging of the armed forces; the reopening of trials; and, international co-operation with extradition requests.<sup>941</sup>

President Kirchner appointed three new judges to the Supreme Court who held favourable positions regarding accountability initiatives<sup>942</sup> and repealed Decree 1.581. Similarly, Kirchner's government ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. This ratification forced the State to punish such human rights violations and made extradition possible.<sup>943</sup> But one of the main achievements of the Kirchner administration was the annulment of the amnesty laws. In August 2003, the Congress adopted Law 25.779 which declared the *Full Stop* and *Due Obedience* laws 'null, as if they had never existed'. Moreover, the Court upheld the constitutionality of Law 25.779 and declared both Alfonsín laws unconstitutional in June 2005. The Court noted that both amnesty laws were contrary to international norms and consequently obliged the State to investigate and sanction the dictatorship's gross human rights violations, considering them as 'crimes against humanity'. In the same vein, Menem's pardons were considered

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<sup>940</sup> Namely Ramón Puerta, Adolfo Rodríguez Saá, Eduardo Camaño and finally, Eduardo Duhalde.

<sup>941</sup> Lessa, F., 'Nunca Más. The Politics of Transitional Justice in Argentina and Uruguay 1983 – 2010', *op. cit.*, p. 30.

<sup>942</sup> Eugenio Raúl Zaffaroni, Elena Higton de Nolasco and Carmen María Argibay.

<sup>943</sup> Lessa, F., 'Nunca Más. The Politics of Transitional Justice in Argentina and Uruguay 1983 – 2010', *op. cit.*, p. 31

to be null and void by some federal judges first, and later confirmed by the Supreme Court.<sup>944</sup>

Since the first sentence issued in 2006 after the annulment of the impunity laws, 3,112 people have been charged, 185 sentences were handed down, in which 781 people were convicted for crimes against humanity and 80 were acquitted, while 508 have passed away.<sup>945</sup> One of the most representative cases was the sentencing of former police official Miguel Etchecolatz to life imprisonment in September 2006. He was convicted for the illegal arrest, torture and homicides of six disappeared, and the kidnapping and torture of two survivors. For the first time, the court upheld that those crimes were part of a bigger picture: the genocide committed in Argentina under the dictatorship.<sup>946</sup> Many key proceedings and trials are still currently ongoing. With the re-opening of the trials, however, several witnesses were threatened or intimidated to dissuade them from providing testimony. One of the most famous cases in this sense was the disappearance of Jorge-Julio López, key witness at the Etchecolatz trial.<sup>947</sup> He disappeared the day before the verdict was delivered in September 2006 and has not been seen since.<sup>948</sup>

Under the Néstor government, Congress approved economic reparations for children born in illegal detention or abducted with their parents. By August 2004, the policy of reparations was completed, including reparations for victims of arbitrary detention, reparations for forced disappearances of persons and assassinations, reparations for the victims of Operation Cóndor, and reparations for minors who were victims of State terrorism. In addition to those economic reparations, symbolic reparations were also adopted in that period, for instance establishing the 24th March as a national holiday, the Day of Remembrance for Truth and Justice.<sup>949</sup>

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<sup>944</sup> *Ibid.*

<sup>945</sup> Statistics to June 30, 2017. Available at <https://www.cels.org.ar/web/estadisticas-delitos-de-lesa-humanidad/> accessed 8 May 2018.

<sup>946</sup> Ollé Sesé, M., *Justicia Universal para Crímenes Internacionales*, La Ley, Wolters Kluwer, 2008, p.315. A further legal analysis on the qualification of genocide is done in section 3.B.a of this chapter.

<sup>947</sup> Miguel Osvaldo Etchecolatz was an ex-policeman known by his participation in a number of repressive operations, in particular, the infamous ‘Noche de los Lápices’ where several secondary school students were kidnapped and later disappeared.

<sup>948</sup> Further information about this case can be found on Rosende, L., and Pertot, W., *Los días sin López. El testigo desaparecido en democracia*, Planeta, 2013.

<sup>949</sup> A further analysis on reparations policy will be made in the next section.

In 2007, Cristina Fernández de Kirchner was elected as new President of the Argentina Republic. She followed the policy of her husband and predecessor with regard to accountability policies for past human rights violations. Furthermore, initiatives to analyse the role of the private sector in the dictatorship started to gain momentum under her administration. However, despite the initial support of Kirchner's accountability initiatives, confronting the violent past caused mixed reactions within Argentinian society. On the one hand, human rights organisations actively supported the proceedings in line with the Kirchner government's accountability policy and considered them fundamental in the achievement of truth, memory and justice. On the other hand, some questioned the President's 'not so altruistic interest' in the human rights issue and believed that it was used to serve her own political purposes.<sup>950</sup> Furthermore, the strong link developed between Kirchner's government and some human rights organisations, particularly *Asociación-Madres*, has been also criticised as detrimental to the spirit of universal human rights protection.<sup>951</sup>

#### **VI.2.D. Current stage and challenges**

Since the end of 2015, and coinciding with the election and government of President Macri, accountability initiatives have significantly decreased. One example of this is that relevant institutions have been weakened or dismantled, such as the National Directorate of Human Rights of the Ministry of Security of the Nation.<sup>952</sup> At the same time, some national officials and politics have promoted a public discourse that

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<sup>950</sup> For instance, Victoria Villarruel, President of the CELTYV (Centro de Estudios Legales sobre el Terrorismo y sus Víctimas). See for instance, 'Sobre el silencio y el dolor de los inocentes, no tenemos futuro', *La Nación*, 25 April, 2010. Available at <http://www.lanacion.com.ar/1257599-sobre-el-silencio-y-el-dolor-de-los-inocentes-no-tenemos-futuro>, accessed 8 May 2018. Others, such as Graciela Fernández Mejjide (former member of CONADEP) questioned the real commitment of Kirchners as she pointed out that they were never concerned about this subject before, so she suggested they selected this topic in the attempt to gain support from the middle classes. See for instance, 'A los Kirchner nunca les importó nunca el tema de los derechos humanos', *El Perfil*, 28 August, 2016. Available at <http://www.perfil.com/politica/graciela-fernandez-mejjide-a-los-kirchner-nunca-les-importo-nunca-el-tema-de-los-derechos-humanos.phtml> accessed 8 May 2018.

<sup>951</sup> See for instance, 'Cuando la memoria se vuelve un arma de la política facciosa', *La Nación*, 30 March, 2017. Available at: <http://www.lanacion.com.ar/2001284-cuando-la-memoria-se-vuelve-un-arma-de-la-politica-facciosa> accessed 8 May 2018.

<sup>952</sup> 'Aguad desmanteló el área de Derechos Humanos del Ministerio de Defensa', *El Diario 24*, 23 December, 2017. Available at: <https://www.eldiario24.com/nota/argentina/411703/aguad-desmantelo-area-derechos-humanos-ministerio-defensa.html> accessed 8 May 2018.

downplays the seriousness of State repression, even going so far as to deny it.<sup>953</sup> Moreover, the bicameral commission to investigate corporate complicity with the dictatorship has not yet been constituted and it does not seem to be a political priority.<sup>954</sup>

With regard to the Ministry of Defense, resolution 85/2013, which prohibited those accused and convicted of crimes against humanity to receive healthcare in hospitals of the Armed Forces, was repealed. With regard to the judicial branch, decisions such as ‘Muiña case’<sup>955</sup> represent regressions in the jurisprudence on crimes against humanity. In that case, the Court applied the ‘2 for 1 law’ to reduce Muiña’s prison term,<sup>956</sup> so it considered that law as applicable also to convicted criminals of crimes against humanity, which provoked a broad and immediate social repudiation.<sup>957</sup> Similarly, the court of cassation revoked the only conviction of a businessman for crimes against humanity in the above-mentioned case of Marcos Levín.<sup>958</sup> Furthermore, the Court recently also declared the statute of limitations applicable on civil actions

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<sup>953</sup> See for instance, ‘Blaming the victims: dictatorship denialism is on the rise in Argentina’, *The Guardian*, 29 August 2016, Available at <https://www.theguardian.com/world/2016/aug/29/argentina-denial-dirty-war-genocide-mauricio-macri> accessed 8 May 2018; or ‘Polémica en Argentina por las cifras de desaparecidos de la dictadura’, *El País*, 28 January 2016. Available at [https://elpais.com/internacional/2016/01/27/argentina/1453931104\\_458651.html](https://elpais.com/internacional/2016/01/27/argentina/1453931104_458651.html) accessed 8 May 2018. See also in this sense ‘Macri evitó precisar la cifra de desaparecidos y generó rechazos’, *La Nación*, 11 August 2016. Available at <http://www.lanacion.com.ar/1926868-macri-evito-precisar-la-cifra-de-desaparecidos-y-genero-rechazos> accessed 8 May 2018.

<sup>954</sup> Interview with Leandro Recalde, July 2017. Buenos Aires, Argentina.

<sup>955</sup> Luis Muiña was arrested in 2007 and sentenced in 2011 to 13 years in prison for having participated in a paramilitary group that tortured people during the last military regime.

<sup>956</sup> ‘Recurso de hecho deducido por la defensa de Luis Muiña en la causa Bignone, Reynaldo Benito Antonio y otros/recurso extraordinario’ (CSJN 1574/2014/RH1), 3 May, 2017. Full document available at <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/Mui%C3%B1a,%20Luis%20%28Causa%20Bignone%29.pdf> accessed 10 May 2018.

<sup>957</sup> The expression ‘2x1’ makes reference to the Law 24.390 which was in force in Argentina between 1994 and 2001 with the aim of reducing the prison population, composed largely of people with preventive detention and without a final judgement. The law established that in order to calculate the time of deprivation of liberty of a convicted person, each day of preventive detention that had exceeded the legal term of two years was equivalent to the fulfillment of two days of the sentence. See ‘El caso Muiña: los argentinos rechazan el atropello a los derechos humanos’, *The New York Times*, 9 May 2017. Available at <https://www.nytimes.com/es/2017/05/09/el-caso-muina-los-argentinos-rechazan-el-atropello-a-los-derechos-humanos/> accessed 10 May 2018.

<sup>958</sup> A further legal analysis of this case is done at the last section of this chapter.

against the State arising from crimes against humanity in the ‘Villamil case’, which established that civil actions for these crimes would be subject to a limit of two years.<sup>959</sup>

While progress has been made to achieve truth and justice, the fight against impunity still presents many challenges. Human Rights organisations requested a public hearing at the IACHR in October, 2017 where State actions that undermine accountability progress were exposed.<sup>960</sup> From a social perspective, there seems to be a general feeling in society of having had enough of this issue and that current economic problems are more urgent now. However, it is interesting how current economic and social dynamics can be directly linked with past policies and abuses committed under the regime.<sup>961</sup>

### **VI.3. Transitional Justice Mechanisms and accountability for ESCRs**

Argentina can be considered as the world leader in transitional justice innovations;<sup>962</sup> it has explored the full range of mechanisms intended to address past human rights violations.<sup>963</sup> This section analyses them within the framework of each transitional justice process, and particularly focusing on those mechanisms which can contribute to addressing and providing accountability for ESCRs violations.

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<sup>959</sup> Villamil, Amelia Ana vs. Estado Nacional sobre daños y perjuicios. Villamil filed a claim against the Argentinian State for her son and her daughter-in-law’s disappearances in 1977. A summary of the case and the sentence can be found at <http://www.cij.gov.ar/nota-25380-La-Corte-Suprema--por-mayor-a--ratific--su-precedente-sobre-la-prescripci-n-de-acciones-civiles-contra-el-Estado-en-juicios-de-lesa-humanidad.html> accessed 10 May 2018. A further analysis on this issue is done in section 3.B.a of this chapter.

<sup>960</sup> CELS, ‘Audiencia CIDH: retrocesos en el proceso de Memoria, Verdad y Justicia’, 24 October 2017. Summary available at <https://www.cels.org.ar/web/2017/10/audiencia-cidh-retrocesos-en-el-proceso-de-memoria-verdad-y-justicia/> accessed 10 May 2018.

<sup>961</sup> At economic level, external debt incurred during the dictatorship –which mainly belonged to corporations close to the regime- still have a negative impact on the population, which has been also reflected in a high level of social inequality. At the social level, the deepening of social inequality is also a consequence of the last dictatorship. See for instance various interviews and testimonies from human rights organisations ‘¿Cuáles son las secuelas de la dictadura cívico-militar en la actualidad?’, March 2017. Available at <https://www.laprimera piedra.com.ar/2017/03/cuales-las-secuelas-la-dictadura-civico-militar-2017/> accessed 10 May 2018.

<sup>962</sup> Payne, L.A., and Pereira, ‘Accountability for Corporate Complicity in Human Rights Violations: Argentina’s Transitional Justice Innovation?’, in Verbitsky, H. and Bohoslavsky, V (eds.), *The Economic accomplices to the argentine dictatorship. Outstanding debts, op. cit.*, p.29.

<sup>963</sup> Smulovitz, C., ‘The Past Is Never Dead’: Accountability and Justice for Past Human Rights Violations in Argentina’, in Popovski, V. and Serrano, M., *After oppression: Transitional justice in Latin America and Eastern Europe*, United Nations University, 2012, p. 65.

### VI.3.A. Truth

The Truth process in Argentina has gone through different stages but it has been predominantly driven by the human rights organisations. Indeed, at its earliest stages, victims' relatives' main objective was to know the truth about what happened with their loved ones and those who had disappeared. In this sense, initial efforts resulted in the systematization of information concerning disappearances and arrests, which was submitted to the IACHR during its visit to Argentina in 1979. That compilation certainly contributed to the creation of a preliminary list of victims and repressive patterns.<sup>964</sup> In August 1983, a Technical Commission for Data Production<sup>965</sup> was created by the main human rights organisations.<sup>966</sup> Again the purpose was to gather and systematize the information they all had in their respective archives in order to share it and to facilitate the research.<sup>967</sup> Those initiatives served as basis for the later work of Argentina's Truth Commission.

#### VI.3.A.a. Argentina's Truth Commission: *CONADEP*

Argentina's Truth Commission was mainly tasked to investigate the fate of the *disappeared*. Its exclusive focus reflected what was believed at the time to be the main methodology of repression, while at the same time there was still hope that some of the disappeared might yet be found alive.<sup>968</sup>

The foundational decree of CONADEP specified a number of functions, including:

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<sup>964</sup> Balardini, L., 'Argentina. Regional protagonist of transitional justice', in Skaar, E., Garcia-Godos, J., and Collins, C., *Transitional Justice in Latin America. The uneven road from impunity towards accountability*, Routledge, 2016, p. 55

<sup>965</sup> Original name in Spanish was 'Comisión técnica de recopilación de datos'.

<sup>966</sup> Namely CELS, Familiares, Abuelas, Asamblea Permanente por los Derechos Humanos and Movimiento Ecueménico por los Derechos Humanos.

<sup>967</sup> The work of this Commission was mainly to classify existing data on arrested or disappeared based on demographic and occupational variables, locating clandestine detention centres, and identifying the names and ranks of alleged perpetrators. This information is available at the CELS Archive – documents on the Technical Commission's work.

<sup>968</sup> Balardini, L., 'Argentina. Regional protagonist of transitional justice', *op. cit.*, p. 55.



- i) Receive claims and proof of the events, and forward these data to the judiciary;
- ii) Reveal the fate of disappeared persons;
- iii) Find children who had been abducted from their parents or guardians and, when successful, handing jurisdiction over to child service organizations and courts;
- iv) Report to the judiciary any attempt to conceal, remove or destroy evidence related to the investigation;
- v) Submit a final report with a detailed account of the events in question within a timeframe of 180 days.<sup>969</sup>

Despite facing opposition by armed forces and initially scepticism by human rights groups, the Commission received in nine months 7,000 testimonies and documented 8,961 cases of disappeared persons.<sup>970</sup> It also identified 365 clandestine detention centres and inspected 50 of them.<sup>971</sup> As mentioned earlier, its final report recommended that forced disappearances be considered as crimes against humanity,<sup>972</sup> while insisting on the need for a ‘deep judicial investigation’ of reported events. Similarly, it called for reparations to victims. The information gathered by the Truth Commission certainly contributed to preparing later judicial proceedings. Indeed, trials started just eighteen months after the military government left power.

In December 2003, the National Archive of Memory (ANM) was founded to preserve documents belonging to CONADEP and update them as a follow-up of this important truth policy. It also established the Unified Registry of Victims of State Terrorism<sup>973</sup> in 2012.

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<sup>969</sup> Decree 187/83, adopted the 15th of December, 1983.

<sup>970</sup> Witnesses included 1,500 survivors. See Crenzel, E., *La historia política del Nunca Más. La memoria de las desapariciones en la Argentina*, Siglo XXI editores, 2008, pp. 115.

<sup>971</sup> The definition of clandestine detention centre provided by CONADEP included any location, military or not, where any disappeared person was held, regardless of the duration of the detention.

<sup>972</sup> Specifically, the report recommended ‘d) That laws be passed which: 1. Declare forced abduction a crime against humanity.’ CONADEP Final Report, Recommendations.

<sup>973</sup> Registro Unificado de Víctimas del Terrorismo de Estado.

While CONADEP's work played a significant role in the possibility of achieving accountability,<sup>974</sup> the notion of victim covered? was limited to the *desaparecidos*. Not even survivors and those who were killed were included in the Commission's research tasks.<sup>975</sup> It is not surprising, then, that abuses of ESCRs and corporate links were not conceived as relevant aspects of State repression. References to ESCRs violations, as well as the role of companies in repressive actions, were just part of the report's background;<sup>976</sup> that is, part of the context in which most serious human rights violations, such as murders, tortures and forced disappearances, were committed. The report highlighted in this sense, that repression 'involved not only attacks against the freedom and security of individuals, but also the systematic and simultaneous transgression of other legal rights, such as property and public documents to facilitate the transfer of goods or to set up non-existent transactions.'<sup>977</sup> It also referred to the 'limitless number of economic crimes'<sup>978</sup> committed by the military government, but again pointing out that they were beyond the aims of CONADEP's investigation tasks.<sup>979</sup>

Similarly, the report clearly reflected that workers were one of the main targets of the State repression. The report Stated that 30.2 % of victims were blue-collar workers, and 17.9% were white-collar workers,<sup>980</sup> highlighting that 'the close links between union activity and resulting unrest and the disappearance of persons' were demonstrated.<sup>981</sup> It also provided representative examples, such as the *Ford Motors*

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<sup>974</sup> As all the information collected was submitted to the Judiciary for criminal investigation and it served as valuable evidence for charging nine *Juntas* members with the perpetration of these crimes, as described later in this chapter.

<sup>975</sup> However, the Commission recorded survivors' experiences to illustrate repressive methodologies and other relevant information. Similarly, the some cases of victims who were killed were also recorded such as the case of Ricardo Adrián Pérez y María G. Esther Cubas de Pérez, to show how repression operated. See for those cases CONADEP Final Report, Part I, The Repression, F. Death as a Political Weapon: Extermination.

<sup>976</sup> Indeed, when referring to violations of others' rights such as property, the report notes that 'we are referring here to crimes committed in the course of carrying out the official policy of making people 'disappear, leaving aside the limitless number of economic crimes which were committed by the *de facto* authorities during their administration, as those go beyond the aims of the present investigation'. CONADEP Final Report, Part I, The Repression, 'M. The profits of repression'.

<sup>977</sup> *Ibid.*

<sup>978</sup> While the focus of this thesis is ESCRs violations and not economic crimes, it is worth mentioning that the report also referred to these economic elements of the regime.

<sup>979</sup> *Ibid.*

<sup>980</sup> CONADEP Final Report, Part II, The Victims, 'H. Trade Unionists'.

<sup>981</sup> *Ibid.*

Factory in General Pacheco, in which testimonies and information collected evidenced the focus of repressive activity on union delegates.<sup>982</sup> However, no direct reference to labour rights violations was made within the entire report.

CONADEP's final report concludes by stating that 'contrary to what the executors of this sinister plan maintain', 'they did not pursue only the members of political organizations who carried out acts of terrorism. Among the victims are thousands who never had any links with such activity but were nevertheless subjected to horrific torture because they opposed the military dictatorship, took part in union or student activities, were well-known intellectuals who questioned State terrorism, or simply because they were relatives, friends, or names included in the address book of someone considered subversive'.<sup>983</sup> Thus, the notion of *subversivity* was extended to anyone who opposed the regime, but particularly to those workers who actively claimed their labour rights and were members of trade unions.

Ultimately, economic actors and elements of repression were conceived simply as part of the contextual circumstances in which repressive operations took place, but they were not further analysed as it was not part of CONADEP's mandate.

### **VI.3.A.b. Truth trials**

In 1999, after a group of human rights organisations lodged a complaint known as the Lapacó case,<sup>984</sup> the IACHR confirmed that the State has to guarantee the 'right to the truth' to victims and relatives for what happened to their disappeared loved ones.<sup>985</sup> That decision also led to what became known as 'truth trials'.<sup>986</sup>

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<sup>982</sup> *Ibid.*

<sup>983</sup> CONADEP Final Report, Conclusions.

<sup>984</sup> Carmen Lapacó was member of Madres- Línea Fundadora and CELS. She demanded her right to know the truth and her right to mourn her disappeared daughter, Alejandra.

<sup>985</sup> IACHR, *Carmen Aguilar de Lapacó v. Argentina*, Report No. 21/00, Case 12.059. Available at <http://www.cidh.org/annualrep/99eng/Friendly/Argentina12.059.htm>

<sup>986</sup> Smulovitz, C., 'The Past Is Never Dead': Accountability and Justice for Past Human Rights Violations in Argentina', in Popovski, V. and Serrano, M., *After oppression: Transitional justice in Latin America and Eastern Europe, op. cit.*, p. 75.

‘Truth trials’ have been an Argentina transitional justice innovation. They are judicial proceedings which aimed to investigate and document past human rights abuses. However, there were neither defendants nor judgements. The main goal was to find out the truth about the fate of the disappeared. Given that the military were summoned just as witnesses and were not prosecuted, many of them revealed important information on the nature of the crimes that they had perpetrated.<sup>987</sup> While their impact was quite varied, they were very useful in gathering information that was utilised later in criminal proceedings.<sup>988</sup>

Workers’ repression was also revealed in testimonies given in these ‘truth trials’, particularly concerning conflicts in the factories of corporations that had been close to the regime. For instance, in 1998, an employee of *Alpargatas* explained that he was kidnapped during a strike while the police officers who arrested him told him ‘that he had to accompany them because there was a report from the espadrille factory.’ Similarly, links between the reduction of factory conflicts, the rise in productivity, and the disappearance of workers and trade unionists were evidenced at the ‘truth trials’ held in La Plata in 2001.<sup>989</sup> Nevertheless, the focus was still on *disappeared*, so ESCRs and labour aspects of repression served in those trials as the context of other human rights violations.

### **VI.3.B. Justice**

#### **VI.3.B.a. Domestic trials**

Criminal proceedings have been a key element of the transitional justice process in Argentina. Indeed, it is the only country in Latin America, and one of the few countries in the world, that successfully prosecuted members of military juntas in

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<sup>987</sup> For a further analysis on this topic see Andriotti Romanin, E., ‘Decir la verdad, hacer justicia: Los Juicios por la Verdad en Argentina’, *Revista Europea de Estudios Latinoamericanos y del Caribe*, No. 94 2013, pp. 5-23.

<sup>988</sup> It was stronger in provinces like La Plata and Buenos Aires, and less so in others.

<sup>989</sup> Basualdo, V., Ojea Quintana, T., and Varsky, C., ‘The Cases of Ford and Mercedes Benz’, in Verbitsky, H. and Bohoslavsky, JP. *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts, op. cit.,* p.167.

domestic courts shortly after the fall of the regime.<sup>990</sup> While prosecutions were limited to high-ranking officers within the first stages of the transition to democracy, Kirchner's administration actively supported the re-opening of trials,<sup>991</sup> and international cooperation on these issues.<sup>992</sup> It is important to note that the earliest prosecutions took place in the immediate aftermath of the dictatorship when transitional justice basic principles related to the most egregious human rights violations were still not consolidated.<sup>993</sup>

In 1983, Alfonsín's government adopted Decree no. 158,<sup>994</sup> ordering the prosecution of the members of military juntas.<sup>995</sup> The Juntas Trial started in April 1985 and lasted for eight months. The former Junta members were charged and convicted under the existing Argentine Criminal Code for crimes of homicide, unlawful deprivation of liberty, torments, theft, and murder. Concepts that are now widely used to tackle massive human rights violations such as those committed in Argentina were not legally enshrined by that period.<sup>996</sup> In fact, human rights conventions were ratified and entered into force within the first years of democracy.<sup>997</sup>

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<sup>990</sup> All nine members of the three military Juntas were prosecuted under charges contained in the Argentine Criminal Code: unlawful deprivation of liberty, torments, theft, and murder.

<sup>991</sup> Amnesties and pardons certainly also hampered the struggle for justice. Since those laws were finally annulled by Congress in 2003, large-scale trials started.

<sup>992</sup> The President also ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

<sup>993</sup> Similarly, international criminal law and specific human rights conventions related to gross human rights violations were still under development. Beyond the International Convention on the Prevention and Punishment of the Crime of Genocide (adopted in 1948), the Rome Statute creating the ICC was not adopted until 1998 (entered into force in 2002). Similarly, the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 1984 (entry into force in 1987), and the International Convention for the Protection of All Persons from Enforced Disappearance was not adopted until 2006 (entry into force in 2010). See Gil Lavedra, R., 'The possibility of criminal justice. The Argentinean experience', in Almqvist, J. and Espósito, C. (Eds), *The Role of Courts in Transitional Justice. Voices from Latin America and Spain*, Routledge, 2012, pp. 56-80.

<sup>994</sup> Simultaneously, Decree no. 157 ordered the prosecution of guerrilla organisations. By doing so, the government intended to appear as a neutral actor with regard to past violence, again supporting the 'theory of two demons'

<sup>995</sup> Sancinetti, M., *Derechos humanos en la Argentina postdictatorial*, Manuel Lerner Editores, 1988, p. 175.

<sup>996</sup> The notion of crimes against humanity, *ius cogens*, international responsibility of State, just to mention some of them. See Gil Lavedra, R., 'The possibility of criminal justice. The Argentinean experience', *op. cit.*, p. 69.

<sup>997</sup> The Inter-American Convention on Human Rights was ratified by Argentina on 14 August 1984, the International Covenant on Civil and Political Rights on 8 November 1986, and the Convention against torture on 26 June 1987.

Following the adoption of the ‘Due Diligence’ and ‘Full Stop’ laws, the criminal accountability process suffered an *impasse*.<sup>998</sup> While those amnesty laws covered crimes such as unlawful deprivation of liberty and murder, there were other violations regarded as not reliant on superior orders, and thus, subject to punishment. Therefore, child abduction, rape, sexual abuse and theft could still be prosecuted despite the amnesty laws. However, human rights organisations focused their efforts only on child abduction cases.<sup>999</sup>

The extraordinary momentum of international human rights law in the 1990s had a significant impact on the case of Argentina. During those years, principles related to the most egregious human rights violations were consolidated, and the actual incorporation of them in the domestic legal regimes certainly contributed to defining the content of the transitional justice process in different countries, particularly in South America. Remarkably, the IACtHR established, in the case of *Velásquez Rodríguez*,<sup>1000</sup> the State obligations to prevent, investigate and sanction all human rights violations.<sup>1001</sup> Similarly, the Court confirmed that impunity was contrary to the duty of investigation.<sup>1002</sup> Particularly concerning the transitional justice process in Argentina, the IACHR adopted a Report in 1992,<sup>1003</sup> in which it concluded that amnesties and pardons were contrary to the Convention since they did not allow the victims their right to obtain judicial prosecutions against perpetrators.<sup>1004</sup>

Furthermore, the creation of the two *ad hoc* Criminal Tribunals for the former Yugoslavia in 1993 and Rwanda in 1994, certainly demonstrated the international community’s commitment to prosecute serious human rights violations that amount to international crimes. It should be noted that the statutes of those tribunals contributed to

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<sup>998</sup> Only twelve criminal trials were held between 1987 and 2000.

<sup>999</sup> Balardini, L., ‘Argentina. Regional protagonist of transitional justice’, *op. cit.*, p.68.

<sup>1000</sup> IACtHR, *Velásquez Rodríguez v. Honduras*, Series C No 4, Judgement of 29 July 1998.

<sup>1001</sup> *Ibid.* para. 166

<sup>1002</sup> *Ibid.* para. 17

<sup>1003</sup> Argentina had signed and ratified the American Convention on Human Rights in 1984.

<sup>1004</sup> IACHR, Report No. 28/92, EA/Ser.L/V/II.83 Doc 14 at 41 (1993), 2 October 1992. The report was in response to several petitioners who had been put forth against amnesties law and governmental pardons. IACHR, *Consuelo et al v. Argentina*, Case Nos. 10.147, 10.181, 10.240, 10.262, 10.309, 10.311. Consequently, the IACHR established that those amnesties adopted by democratic governments since 1984 were against the Convention.

the definition of the concept of crimes against humanity.<sup>1005</sup> With the establishment of the International Criminal Court in 1998, the international community reaffirmed its commitment to punish the most egregious human rights abuses. Additionally, the Inter-American Convention concerning Enforced Disappearances of Persons in 1994 was incorporated into Argentinian domestic law in 1997, which definitely contributed to framing past human rights violations committed under State repression in Argentina.<sup>1006</sup>

With the annulment and derogation of the amnesty laws, legal barriers to prosecute perpetrators were overcome and with the government of Néstor Kichner, cases started to reopen throughout the country, such as the mega-case of the Navy School of Mechanics (ESMA) in Buenos Aires.<sup>1007</sup> However, practical challenges still remained.<sup>1008</sup> In 2007, the Office of the Public Prosecutor created the Prosecutorial Unity for Co-ordination and Monitoring of the Cases of Violation of Human Rights under State Repression.<sup>1009</sup> This body presented a report outlining the main factors that caused delays<sup>1010</sup> and a guidance document to overcome those obstacles.<sup>1011</sup> The Unity evolved in 2013 to the current Attorney's Office for Crimes against Humanity.<sup>1012</sup> One of the new working areas of this new institution is precisely to address the responsibility

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<sup>1005</sup> The notion of crimes against humanity has not yet been codified in a dedicated treaty of international law, unlike genocide and war crimes. Despite this, the prohibition of crimes against humanity, similar to the prohibition of genocide, has been considered a peremptory norm of international law, from which no derogation is permitted and which is applicable to all States.

<sup>1006</sup> The Convention was ratified by Argentina on 18 October 1995 (Law no. 24.556) and incorporated into its Constitution on 29 May 1997 (Law no.24.820)

<sup>1007</sup> The biggest trial for crimes against humanity concluded in 2017, five years after it was initiated. Further information about this case can be found at CELS archive. Available online at <http://www.cels.org.ar/especiales/megacausaesma/> accessed 12 May 2018.

<sup>1008</sup> For instance, each judge acted under their own discretion, which had important effects, particularly because some judges were opposed to the trials, so they performed several delay tactics.

<sup>1009</sup> Unidad Fiscal de Coordinación y Seguimiento de las Causas por violaciones a los Derechos Humanos cometidas durante el terrorismo de estado. Ministerio Público Fiscal, Procurador General de la Nación, Resolution PGN 14/07, 1 March 2007.

<sup>1010</sup> 'Algunos problemas vinculados al trámite de las causas por violaciones a los DDHH cometidas durante el terrorismo de Estado'

<sup>1011</sup> 'Pautas para la implementación de la Resolución PGN 13/08'

<sup>1012</sup> Ministerio Público Fiscal, Procurador General de la Nación, Resolution PGN 1442/13, 29 July 2013. Available at <http://www.mpf.gov.ar/resoluciones/pgn/2013/PGN-1442-2013-001.pdf> accessed 12 May 2018.

of civilians, including government and judicial officials and business and economic groups.<sup>1013</sup>

Criminal cases investigated for State repression in Argentina have been filed under the Argentine criminal code for ‘unlawful deprivation of liberty’ as enforced disappearance, ‘torments’ as torture, homicide, theft, and child abduction. Charges for rape and sexual abuse have been also brought to justice more recently, but their investigation has faced many challenges.<sup>1014</sup>

In 2005, the Supreme Court declared in the *Simón Case*<sup>1015</sup> the Non-Applicability of Statutory Limitations to crimes committed under State repression by considering them as crimes against humanity, according to the Rome Statute. Therefore, cases of this new stage would draw from this consideration. Certainly, the categorization of those crimes as crimes against humanity by the doctrine and domestic courts contributed to consolidating the idea that State repression was not random but a State-organised plan. According to the Art. 7.1 of the Rome Statute of the International Criminal Court, the notion of ‘crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

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<sup>1013</sup> *Ibid.* Considerando no.5, p. 5.

<sup>1014</sup> See on this topic Balardini, L, Oberlin, A and Sobredo, L., ‘Violencia sexual y abusos sexuales en centros clandestinos de detención. Un aporte a la comprensión de la experiencia argentina’ in *Hacer Justicia. Nuevos debates sobre el juzgamiento de crímenes de lesa humanidad en Argentina*, Centro de Estudios Legales y Sociales (CELS) y Centro Internacional para la Justicia Transicional (CIJT), Siglo XXI Editores, 2011.

<sup>1015</sup> See supra note 935.



- h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i. Enforced disappearance of persons;
- j. The crime of apartheid;
- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>1016</sup>

The contextual element of crimes against humanity involves either large-scale violence in relation to the number of victims or its extension (widespread), or a methodical type of violence (systematic). This certainly excludes random or isolated acts of violence. Additionally, Article 7.2 (a) of the Rome Statute establishes that these crimes must be committed in furtherance of a State or organizational policy to commit an attack. It is not required that the plan is explicitly stipulated or formally adopted, but it can, therefore, be inferred from the totality of the circumstances.

It is worth mentioning that there have been significant discussions around whether to classify human rights abuses under State repression in Argentina as crimes against humanity or as genocide. While the notion of crimes against humanity does not require the targeting of a specific group, genocide implies the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group.’<sup>1017</sup> Some have argued that State repression in Argentina focused on political dissidents,<sup>1018</sup> what would constitute in their view a specific target, and consequently, a crime of genocide.<sup>1019</sup>

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<sup>1016</sup> Rome Statute of the International Criminal Court, 17 July 1998. See also Rueda Fernández, C., ‘Los crímenes contra la humanidad en el Estatuto de la Corte Penal Internacional: ¿por fin la esperada definición?’, en Carrillo Salcedo, J.A (coord.), *La criminalización de la barbarie: la Corte Penal Internacional*, Consejo General del Poder Judicial, 2000, pp. 301-325.

<sup>1017</sup> Convention on the Prevention and Punishment of the Crime of Genocide, article II. General Assembly resolution 260 A (III) of 9 December 1948; See also the Rome Statute of the International Criminal Court, article 6.

<sup>1018</sup> Particularly, on activists and militant workers and students who in an organized way, questioned then the constituted power.

<sup>1019</sup> The final goal of repression was, in their view, to eradicate the human group that carried the ideal of a different society. They argue that the notoriety of the facts and official Statements such as ‘we must destroy those who oppose Western and Christian civilization’ or ‘we must eliminate the enemies of the

However, political groups are not identified as a target in the crime of genocide. This debate took place within the framework of first criminal proceedings, both in the courts and in the social sciences and legal scholarship. Regarding the debate in domestic courts, Argentina's Supreme Court ruled in 2009 in the well-known Etchecolatz case, that the dictatorship's repressive actions constituted 'crimes against humanity within the framework of [a] genocide'.<sup>1020</sup> Since then, some domestic courts have agreed in their sentences with that legal qualification while others have rejected it.<sup>1021</sup>

Variability regarding penalties is related to the sort of charges made against alleged perpetrators. Given that there were no specific penalties in the Argentinian Penal Code for crimes against humanity or genocide at the time that the violations took place, these were framed as ordinary crimes as mentioned in the penal code by the time of making the accusations. That was, homicide, aggravated homicide, unlawful deprivation of liberty, torment, rape, etc. According to Office of the Public Prosecutor data, since 2006, when the trials for crimes against humanity reopened,<sup>1022</sup> to date, 593 cases have been launched in Argentina for these crimes, of which 33% are sentenced, 47% are in the investigation stage, 17% are awaiting trial and 3% are in court.<sup>1023</sup> Similarly, it has been pointed out that cases take an average of five years from they are brought to trial until the final judgement. Bearing this in mind, it has been estimated that the completion of cases for crimes against humanity would take until mid-2024, 18

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Argentine soul' reflected that intention. See in this sense, Mántaras, M., *Genocidio en Argentina*, Chilavert, 2005. Human rights organisations and lawyers such as 'Justicia Ya!' and Carlos Slepoy have advocated for the categorization of genocide for human rights violations committed under the military regime. See for instance, Slepoy, C., ¿Crímenes de lesa humanidad o genocidio?', Página 12, 12 May 2009, Available at <https://www.pagina12.com.ar/diario/elpais/1-124769-2009-05-12.html> accessed 10 May 2018.

<sup>1020</sup> 'Etchecolatz, Miguel Osvaldo s/ homicidio calificado', Causa N° 2251/06, Tribunal Oral Federal 1-La Plata, 19 September 2006, p. 88. Available at <http://crimenesdeestado.untref.edu.ar/ficha-sentencia.php?s=100> accessed 12 May 2018.

<sup>1021</sup> For a further analysis on the causes of rejection see Equipo de Asistencia Sociológica a las Querellas, 'Informe sobre el juzgamiento del genocidio argentino', Tela de juicio. Debates en torno a las prácticas sociales genocidas, 2015. It contains judgements from 2006 to december 2014. Available at <http://publicaciones.sociales.uba.ar/index.php/teladejuicio/article/view/1613/1428> accessed 12 May 2018.

<sup>1022</sup> Since the Argentina's Supreme Court judgement in 2009 (in the Etchecolatz case), crimes committed under State repression have been generally framed ('caratulados') as crimes against humanity. Indeed, the Public Prosecutor Office dedicated an entire section to deal with these cases. Further information available at <https://www.fiscales.gob.ar/lesa-humanidad/> accessed 13 May 2018.

<sup>1023</sup> Procuraduría de Crímenes contra la Humanidad, Informe Estadístico sobre el Estado de las Causas por Delitos de Lesa Humanidad en Argentina, 2017, p.7. Available at <http://www.fiscales.gob.ar/wp-content/uploads/2018/01/Lesa-Humanidad-Estado-de-las-Causas-2017.pdf> accessed 13 May 2018.

years after the beginning of trials, and about 50 years since the events took place.<sup>1024</sup> Trials for crimes against humanity are oral and public.

While the Supreme Court declared that criminal actions against individuals charged with crimes against humanity are not subject to statutes of limitations, there are still controversies about that in the field of civil actions.<sup>1025</sup> In this regard, Law 26.994 reformed the Civil and Commercial Code, establishing the non-applicability of statutory limitations to civil claims derived for crimes against humanity.<sup>1026</sup> However, recently, in 2017, the Supreme Court declared the non-retroactivity of the above-mentioned reform for civil actions arising from crimes against humanity.<sup>1027</sup> The decision, with three votes in favor and two against, contended that civil actions from past crimes against humanity will still be subject to the statute of limitations. Consequently, actions for these crimes would be subject to the previous Civil and Commercial Code, which established a limit of two years,<sup>1028</sup> with the exception of cases under section 3980 of the Civil Code.<sup>1029</sup>

As mentioned above, charges in Argentina's judicial system have mainly focused on violations of CPRs included in the notion of crimes against humanity, such as murder and torture. Once again, the main and earliest focus of the transitional justice process was the disappearances and body integrity violations, which were considered as

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<sup>1024</sup> *Ibid.* p.5

<sup>1025</sup> Many victims, including President Menem himself, who was a political prisoner between 1976 and 1981, initiated legal actions. However, many of them were initially rejected on statute of limitation grounds, which establishes two years for these cases. Some of the prisoners released before the regime ended argued that they had been unable to initiate legal action at that time because the State did not provide them with enough guarantees. Consequently, they demanded an additional period for filing a suit, according to the provisions of the law. They claimed that the period for calculating the statute of limitations should start on December 10, 1983, when democracy was reestablished. Many of these cases were resolved internally by judicial rulings that the statute of limitations should be calculated beginning December 10, 1983, extending the period for filing a lawsuit through December 19, 1985. In these cases, the judges State that security conditions for presenting accusations only existed after that date, when democracy was reestablished. These cases were not appealed by the State, and the Supreme Court therefore did not review them.

<sup>1026</sup> Article 2.561.

<sup>1027</sup> In the 'Villamil Case'. Villamil, Amelia Ana vs. Estado Nacional sobre daños y perjuicios, p.6-7, para. 11. Available at <http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-villamil-amelia-ana-estado-nacional-danos-perjuicios-fa17000013-2017-03-28/123456789-310-0007-1ots-eupmocsollaf> accessed 13 May 2018.

<sup>1028</sup> Article 4.037. 'Se prevé un lapso de prescripción de dos años en la acción por responsabilidad civil extracontractual'.

<sup>1029</sup> Those sections gave judges discretion to compute a different time limit in consideration of the claimant's difficulties or actual impossibility.

the most serious ones. ESCRs violations, and particularly, labour rights violations have had a very collateral role. Indeed, judicial references to those violations are closely linked to corporate complicity with the military regime.<sup>1030</sup> Labour law was used in a creative way in this sense to charge companies with failing to protect their workers' safety, but no civil or criminal actions have been brought to court with regard to ESCRs violations.<sup>1031</sup>

### **VI.3.B.b. Lawsuits in foreign courts**

While amnesty laws were blocking criminal justice in domestic courts, proceedings for military officials were opened by courts in some European countries on the basis of universal jurisdiction. Although the definition and exercise of universal jurisdiction varies around the world,<sup>1032</sup> this principle generally allows any State to prosecute and punish serious human rights violations committed anywhere in the world.<sup>1033</sup>

In March 1990, the French *Court of Cassation* convicted Alfredo Astiz *in absentia* for the forced disappearance of nuns Leonie Duquet and Alice Domon. Other European countries such as Italy, Germany and Sweden also opened several trials for crimes committed under the dictatorship in Argentina.<sup>1034</sup> There were also convictions *in absentia* in Italy in 2000. In 2001, Germany requested the extradition of Guillermo Suarez Mason and Sweden demanded the arrest of Alfredo Astiz for the murder of

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<sup>1030</sup> As it will be further analysed in section three of this chapter.

<sup>1031</sup> Concerning labour rights violations, it is worth noting that Argentina signed and ratified ILO Conventions 87 (Freedom of Association and Protection of the Right to Organise Convention) and 98 (Right to Organise and Collective Bargaining Convention) in 1960 and 1956, respectively.

<sup>1032</sup> A national or international court's authority to prosecute individuals for international crimes committed in other territories depends on the relevant sources of law and jurisdiction, such as national legislation or an international agreement, which may, for example, require that only individuals within the country's national territory be subject to prosecution. It should be also noted that this principle is not limited per se to criminal jurisdiction, so it can also address civil actions. See for instance, the case *Filártiga v. Pena-Irala* within the framework of the Alien Tort Act (28 U.S.C. para. 1350)

<sup>1033</sup> See for instance, Randall, K.C, 'Universal jurisdiction under international law', *Texas Law Review*, N.º 66, 1988, pp. 785-788; or International Law Association Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences', 2000, p.2. See also Márquez Carrasco, C., Martín Martínez, M., 'El Principio de Jurisdicción Universal en el Ordenamiento Jurídico Español: Pasado, Presente y Futuro'. *Anuario Mexicano de Derecho Internacional*, Vol. XI, 2011, pp. 251-304.

<sup>1034</sup> All these proceedings were opened for victims who had the nationality of those countries.

Dagmar Hagelin. In November 1999, Spanish Judge Baltasar Garzón ordered the prosecution of 99 Argentine military members and requested the extradition of 48 who were allegedly involved in the disappearance or murder of 297 Spanish citizens<sup>1035</sup> between 1976 and 1983.<sup>1036</sup> However, then President Fernando De la Rúa issued Decree No. 1581/2001, in response to different claims of extradition from foreign courts. With that norm, the government ordered to reject all extradition requests seeking the prosecution of dictatorship crimes. In essence, that measure was another way to ensure impunity as extradition becomes an obligation when it is related to crimes against humanity.<sup>1037</sup>

Lawsuits abroad then became an alternative way for victims to achieve justice as this was very limited at domestic courts. While extraditions were not finally materialized, prosecutions and investigations by foreign courts became a source of legitimacy for victims' and human rights organisations' claims and they pressured for political changes in this field. Abolition by Congress in 2003 of the two amnesty laws which were later declared unconstitutional by the Supreme Court in 2005, opened up a new legal scenario, which gradually gave way to trials in domestic courts up to the present. In April 2005, the National Court of Spain sentenced Adolfo Scilingo to 640 years in prison. He was the first member of the Argentine military forces to be convicted abroad *in presentia*.<sup>1038</sup>

### VI.3.C. Reparations

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<sup>1035</sup> Or with Spanish links.

<sup>1036</sup> See for instance, 'Garzón abre proceso a la dictadura argentina por la desaparición de 297 españoles', *El País*, 13 September 1996. Available at [https://elpais.com/diario/1996/09/13/espana/842565616\\_850215.html](https://elpais.com/diario/1996/09/13/espana/842565616_850215.html) accessed 13 May 2018.

<sup>1037</sup> See in this sense 'The obligation to extradite or prosecute (aut dedere aut judicare), Final Report of the International Law Commission', *Yearbook of the International Law Commission*, 2014, vol. II (Part Two).

<sup>1038</sup> Sentencia de la Audiencia Nacional 16/2005, 19 April 2005. A further analysis can be found on Gil Gil, A., 'La sentencia de la Audiencia Nacional en el caso Scilingo', *Revista Electrónica de Ciencia Penal y Criminología*, n°7, pp.1 -18.

Despite being highly contested by human rights organisations,<sup>1039</sup> reparations policy has probably been the transitional justice mechanism most consistently implemented in Argentina.<sup>1040</sup> A wide range of measures has been employed, from restitution of rights, to economic and symbolic reparations. First recommendations on reparations were made by the CONADEP Final report in the following terms:

‘That the appropriate laws be passed to provide the children and/or relatives of the disappeared with economic assistance, study grants, social security and employment and, at the same time, to authorize measures considered necessary to alleviate the many and varied family and social problems caused by the disappearances.’<sup>1041</sup>

Once again those recommendations were focused on one particular crime: forced disappearances. While some important CONADEP recommendations were directly related to ESCRs, such as the right to health,<sup>1042</sup> the right to education,<sup>1043</sup> and the right to work,<sup>1044</sup> reparations in Argentina have not been linked to social rights as positive State obligations.

The first reparations laws were adopted in 1984 and 1985, which did not only comprise economic reparations but also aimed to restore labour rights. Indeed, many of these laws aimed to address the situation of public servants who had been dismissed under the military regime, such as officials from Argentina's department of foreign affairs,<sup>1045</sup> representatives of State-owned companies,<sup>1046</sup> and teachers.<sup>1047</sup> But also of those in private positions, such as bankers.<sup>1048</sup> In addition, these laws also ordered the restitution of the retirement funds of those ‘who for political or union-related matters

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<sup>1039</sup> Some human rights organisations formed by those who were directly affected by dictatorship abuses rejected the idea of economic reparations. They argued that accepting economic reparations would be like exchanging money for their loved ones, and that it would involve abandoning their demands for justice.

<sup>1040</sup> Balardini, L., ‘Argentina. Regional protagonist of transitional justice’, *op. cit.*, p.59.

<sup>1041</sup> CONADEP Final Report, Part VI, Recommendations, C.

<sup>1042</sup> Article 12, ICESCR.

<sup>1043</sup> Article 13, ICESCR.

<sup>1044</sup> Article 6, ICESCR.

<sup>1045</sup> Law No. 23.053. February 22, 1984.

<sup>1046</sup> Law No. 23.117. September 30, 1984.

<sup>1047</sup> Law No. 23.238. September 10, 1985.

<sup>1048</sup> Law No. 23.523. October 28, 1988.

was suspended, dismissed or forced to resign or to go into exile',<sup>1049</sup> and repealed any suspension in nationality or citizenship.<sup>1050</sup>

Similarly, Law No. 23.466 adopted in 1986, granted a pension and medical coverage to the spouses and children of victims of forced disappearances.<sup>1051</sup> The pension granted would be equivalent to the minimum ordinary amount received by a retired public servant.<sup>1052</sup> In this sense, victims had to prove the forced disappearance, filing an accusation before a judicial body, the former CONADEP or the Secretariat of Human and Social Rights.<sup>1053</sup>

Significant economic reparation laws were successively enacted under Menem's administration. They were purely focused on financial reparations for victims of State captivity and relatives of victims of murder or forced disappearances committed by armed forces and paramilitary groups.<sup>1054</sup> With regard to reparations for victims of arbitrary detention, it was not available for those who had already received compensation for the same violations by judicial ruling. The effective illegal arrest or the act of the Executive which decreed the detention was taken into account to calculate the duration of detentions.<sup>1055</sup> If the person died under captivity, the end of the period was calculated as the time of the death. Moreover, the benefit was increased to 70% for those who suffered from severe injuries.<sup>1056</sup> Detentions should be proved, either with the *habeas corpus* appeals or the sentence, or with records from the competent authorities.<sup>1057</sup>

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<sup>1049</sup> Law No. 23.278. September 28, 1985.

<sup>1050</sup> Law No. 23.059. March 22, 1984.

<sup>1051</sup> Persons who could claim this benefit also included disabled parents or siblings who do not perform any profitable activity and do not enjoy pensions and orphan siblings under age who had lived regularly with the victim before the disappearance. See Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, p. 26.

<sup>1052</sup> *Ibid.*

<sup>1053</sup> *Ibid.*

<sup>1054</sup> Law No. 24.043, passed in 1991 and Law No. 24.411, passed in 1995.

<sup>1055</sup> Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, p 32.

<sup>1056</sup> The concept of 'Severe injuries' was defined in the Penal Code, art. 91. Accordingly, these are those causing a 'physical or mental illness, certainly or probably incurable, permanent work disabilities, the loss of one sense, an organ, a member, the use of an organ or a member, loss of speech, or the capacity to beget or conceive'.

<sup>1057</sup> Such as the CONADEP archives or the IACHR.

Reparations for victims of forced disappearances gave rise to many controversies. As mentioned before, victims' main concern was that receiving economic reparations would be considered as an exchange for perpetrators' impunity.<sup>1058</sup> Consequently, victims insisted on the importance of the fact that reparations would not absolve the State for its responsibility to address these issues in other ways.<sup>1059</sup> Similarly, victims demanded to legally declare their loved ones as disappeared, rather than dead, which implied the recognition that the body had not been recovered.<sup>1060</sup> This is how the new legal status of 'absence by forced disappearance' emerged, with consequences for the procedures for claiming the economic reparations granted by the State. In this sense, Law 23.321<sup>1061</sup> contributed to defining the legal category of forced disappearances, as it does not presume the death but forces the State to accept the illegal abduction by its agents and the fact that the person never appeared again, either dead or alive. Once the victim was declared absent by forced disappearance, beneficiaries of reparations granted by Law 24.411 could start the proceeding.<sup>1062</sup>

Lawsuits for murder could be validated with a judicial ruling or administrative documents which certified that armed forces or paramilitary groups were involved in the crime.<sup>1063</sup> Accusations presented before CONADEP could also serve to validate the assassination.<sup>1064</sup> Victims of forced disappearances who later appeared alive were excluded from this benefit. Those cases were included in the reparations for former political prisoners granted by Law 24.043. Economic reparations were also granted for those cases that, having taken place before the *coup*, were committed in the framework

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<sup>1058</sup> See supra note 923 and 924.

<sup>1059</sup> Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, p. 35.

<sup>1060</sup> Constitutional Act of the military Junta of April, 1983 and the so-called Final Report on the antisubversive fight, resolved that disappeared persons were declared dead.

<sup>1061</sup> Passed in May 11, 1994.

<sup>1062</sup> Those who had a legitimate interest could request the declaration of absence by forced disappearance. This generally included the spouses, ancestors, descendants and relatives to the fourth degree. They had to officially make the request before a judge, who demanded the reports to the authority that received the accusation of disappearance and order the publication of edicts for three consecutive days. After 60 days, the absence by forced disappearance was declared. The date of the original denunciation was fixed as the beginning of the absence. See Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, p. 36.

<sup>1063</sup> This involvement was presumed when the events took place in the facilities of these forces.

<sup>1064</sup> See Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, p.40.



of State repression,<sup>1065</sup> using the same methods by the armed security or paramilitary forces.<sup>1066</sup> Similarly, no distinctions were made based on victims' nationality, so foreign victims of human rights violations in Argentina received the same economic compensation as nationals.

The last reparations laws were passed during Néstor Kirchner's government. In 2004, Law No. 25.914 provided benefits for persons born in captivity or abducted, together with their parents. As Balardini notes, this established a broader notion of victim that contributed to understanding the wider social consequences of repression.<sup>1067</sup> Victims must certify in these cases that their mother was detained or disappeared and their permanence in detention centres. In cases of illegal changes of identity, victims must present a judicial sentence or the forced disappearance of their parents.<sup>1068</sup> However, benefits provided by this law cannot be claimed when victims had already received compensation from courts for the same events.

Economic reparations for those who were forced to exile were not explicitly included in the laws of reparations and it has been discussed for several years. In 2004, however, the Supreme Court of the Nation ruled that those who were forced to exile due to persecution could be compared to those who were illegally detained. According to the Court, the concept of detention established in Law 24.043 did not exclude cases of forced exile. Consequently, the Court stated that reparations should be also granted in those cases.<sup>1069</sup> Similarly, in 2014, the Court recognised this benefit also to those who were born in exile.<sup>1070</sup> While several projects were promoted, no law on forced exile has been passed to date.

Economic reparations took a long time to be effectively implemented and awarded. On the one hand, this was because the main priority in the political transition

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<sup>1065</sup> As analysed in chapter 5, State repression started with the government of María Estela de Perón. See Chapter V.2.B.

<sup>1066</sup> Resolución de la Secretaría de Derechos Humanos en el expediente 'Ortega Peña, Rodolfo s/ solicitud ley 24.411'.

<sup>1067</sup> Balardini, L., 'Argentina. Regional protagonist of transitional justice', *op. cit.*, p.60.

<sup>1068</sup> See Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, p. 43.

<sup>1069</sup> *Yofre de Vaca Narvaja, Susana v. Ministry of the Interior*, Resolution Ministry of Justice and Human Rights 221/00

<sup>1070</sup> *De Maio Ana de las Mercedes v. Ministry of Justice and Human Rights*.

was the establishment of truth for past events and to develop judicial initiatives against perpetrators, so it took time for civil demands to be extended to economic reparations. On the other hand, it was also because of the economic and budgetary problems those reparations had to face, particularly during the economic crisis in 2001.<sup>1071</sup> Full economic reparations have ultimately been provided by the State, with no participation of private entities.

In addition to those economic reparations, symbolic reparations have been adopted in Argentina. Alfonsín's government promoted the first collective testimony of human rights abuses under the dictatorship: the CONADEP report and the trials of Military Juntas. The widespread dissemination of the *Nunca Más* has also been certainly considered as symbolic reparation to acknowledge the truth of the violent past in Argentina.<sup>1072</sup>

Menem's government, however, promoted oblivion. In contrast, 'Memory, truth, and justice' was the motto adopted by human rights organisations advocating to address responsibilities for human rights violations and to develop policies of memory. Indeed, the first law on symbolic reparations was adopted under Menem's administration, in 1994,<sup>1073</sup> which created the legal category of 'missing as a result of enforced disappearance'.<sup>1074</sup> The adoption of this law was seen as a victory for human rights organisations as it recognised the civil condition of detainee-disappeared persons. Similarly, the Legislature of the City of Buenos Aires approved the building of a 'Monument to the victims of State Terrorism' in a 'Park of Memory' in 1998.<sup>1075</sup>

Human rights organisations have also constantly demanded the recovery of sites that once functioned as clandestine detention centres, to transform them into Memory Sites. Maybe the most representative example of that is the recovery of the Former ESMA (School of Naval Mechanics) to create an Official Site for Memory and the

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<sup>1071</sup> See Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, p.41.

<sup>1072</sup> The report was by that time widely distributed at educational and community centres. It was also available at newspaper kiosks. See Rauschenberg, N., 'Memoria política y justicia transicional en Argentina después de treinta años de democracia. Notas para un debate', *Aletheia*, vol. 3 no. 6, 2013, p.3.

<sup>1073</sup> Law No. 24.321

<sup>1074</sup> Balardini, L., 'Argentina. Regional protagonist of transitional justice', *op. cit.*, p.61.

<sup>1075</sup> Website available at <http://parquedelamemoria.org.ar/> accessed 15 May 2018.

Promotion and Defence of Human Rights. In addition, archives, museums, monuments, Human Rights Offices and Memory Commissions had proliferated all over the country. Ultimately, Law No. 26.085 was adopted in 2006 which declared March 24th a national holiday.<sup>1076</sup> These symbolic measures have certainly contributed to building a social discourse on past events, as well as providing public recognition to victims of State repression.

### **VI.3. D. Institutional Reform**

Institutional reform in Argentina within the framework of transitional justice has mainly focused on the justice sector. As has happened in other Latin American countries such as Uruguay and Chile, institutional reforms in Argentina primarily responded to the desire to restore the legitimacy of the Judiciary after its failure to prevent human rights abuses. Indeed, a significant increase in criminal justice has been largely due to many of the institutional reforms carried out. Following initial initiatives in the field of truth through the CONADEP report, efforts focalised then to bring perpetrators of human rights violations to justice. Thus, vetting and removing those who allowed past atrocities was required – or even accomplices in some cases -, as well as reorganising the judicial bodies to make the most of resources available.

Alfonsín's administration removed the majority of judges who were active under the dictatorship, including those who were part of the Supreme Court. However, his government readmitted judges considered relatively liberal and technically competent, which explained a certain level of continuity between the two regimes.<sup>1077</sup> In any case, it should be noted that Alfonsín's policy to sign up to international human rights instruments aimed at protecting domestic human rights policies.<sup>1078</sup> Consequently, shortly after his election, the Congress and the Senate ratified the American Convention on Human Rights and a number of other international human rights instruments,

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<sup>1076</sup> The exact date of the *coup*.

<sup>1077</sup> Skaar, E., 'Un análisis de las reformas judiciales de Argentina, Chile y Uruguay', *América Latina Hoy*, Ediciones Universidad de Salamanca, vol. 34, 2003, p.152.

<sup>1078</sup> Alfonsín sought to draw on international norms to lock-in domestic policies, to internationally anchor domestic political struggles, and to ensure international pressure in case of threats to the democratic regime. See Engstrom, P., 'Transitional Justice, Democratization and the Politics of the Death Penalty in Argentina', in Futamura, M. and Bernaz, N. (eds.), *The Politics of the Death Penalty in Countries in Transition*, Routledge, 2013, p.54.

including the International Covenant on Civil and Political Rights,<sup>1079</sup> and recognised the jurisdiction of the Inter-American Court, which certainly had significant implications for human rights in Argentina.

Under Menem's government, in August 1994, a significant constitutional reform was carried out. Some of the new regulations were directly linked to the judicial branch, namely, the creation of a Council of the Magistracy,<sup>1080</sup> the establishment of the Public Ministry as an independent body,<sup>1081</sup> changes in the procedure for appointing judges of the Supreme Court,<sup>1082</sup> and the establishment of the Jury of Prosecutions.<sup>1083</sup> However, many have argued that the real motivation of this constitutional reform was related to Menem's personal purpose to be re-elected.<sup>1084</sup>

Investigations in fact suffered from the lack of judicial or political guidelines, so in many cases they were completely uncoordinated.<sup>1085</sup> Individual claims were considered separately and common patterns of abuses were neglected. Thus, trials did not accurately reflect the systematic nature of State repression. However, the Prosecutorial Unity for Co-ordination and Monitoring of the Cases of Violation of Human Rights under State Repression was created in 2007.<sup>1086</sup> This new body developed guidance and a common strategy to coordinate trials and overcome the obstacles that they had to face. In 2013, this unity evolved to the current Attorney's Office for Crimes against Humanity,<sup>1087</sup> which includes as a new working area the responsibility of civilians, including government and judicial officials and business and

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<sup>1079</sup> Which Argentina had signed, but not ratified, in 1968.

<sup>1080</sup> Article 114

<sup>1081</sup> Article 120

<sup>1082</sup> It elevated the simple majority in the Senate to two thirds of the members present in the Senate to approve the appointment of a judge.

<sup>1083</sup> It also included constitutional guarantees for the salaries of members of the Supreme Court and lower courts (Article 110). See Skaar, E., 'Un análisis de las reformas judiciales de Argentina, Chile y Uruguay', *op. cit.*, p. 153.

<sup>1084</sup> According to the Constitution of 1853, presidents could only serve during one term. Therefore, a process of careful negotiations with the opposition began, aimed at carrying out that reform, including the possibility to be re-elected. This agreement has been known as 'Pacto de Olivos'.

<sup>1085</sup> Balardini, L., 'Argentina. Regional protagonist of transitional justice', *op. cit.*, p.71.

<sup>1086</sup> See *supra* note 892.

<sup>1087</sup> Ministerio Público Fiscal, Procurador General de la Nación, Resolution PGN 1442/13, 29 July 2013. Available at <http://www.mpf.gov.ar/resoluciones/pgn/2013/PGN-1442-2013-001.pdf> accessed 15 May 2018.

economic groups.<sup>1088</sup> Also in 2007, the Truth and Justice Programme was created to implement a nationwide witness protection programme.<sup>1089</sup>

In 2009, the Supreme Court created a commission involving representatives from the three branches of State: executive, legislative and the judiciary, including the Public Prosecutor's Office. The goal of this commission was to strengthen links between State bodies working on the trials. Similarly, in 2012, the Court of Cassation established a set of practical rules to facilitate and accelerate trials.<sup>1090</sup>

An important and much contested judicial reform was later adopted in April 2013, under the motto of 'democratising the judicial power'. The two most controversial proposals of Cristina's government limited the use of injunctions against the State and forced 12 of the 19 judicial magistrates charged with appointing judges to be elected in public election, and consequently through previous affiliation to political parties.<sup>1091</sup> Later in June, the Supreme Court of Justice declared the unconstitutionality of an important part of the reform<sup>1092</sup> with the vote of six of its seven members.<sup>1093</sup> Lately, Macri's administration has been working on a new reform, so-called 'Justicia 2020'. The reform, which is still a work in progress, intends to be in accordance with the SDG adopted in 2015, particularly with principle number 16.<sup>1094</sup>

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<sup>1088</sup> *Ibid.* 'Considerando' no.5, p. 5.

<sup>1089</sup> Website available at <http://pdh.minjusticia.gob.cl/verdad-y-justicia/> accessed 15 May 2018.

<sup>1090</sup> This document was influenced by a set of guidelines for witness treatment produced by CELS. Document available at: <https://www.cels.org.ar/web/wp-content/uploads/2012/10/Guia-para-la-toma-de-testimonios-a-victimas-de-tortura.pdf> accessed 15 May 2018.

<sup>1091</sup> The United Nations Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, officially condemned the reforms as contrary to the International Covenant on Civil and Political Rights. Many lawyer associations, international NGOs and political parties have voiced their condemnation. See Arrate, R., 'Argentina's Judicial Reform: A Farewell to the Rule of Law and the Separation of Powers', MercoPress, 22 May 2013, Available at <http://en.mercopress.com/2013/05/22/argentina-s-judicial-reform-a-farewell-to-the-rule-of-law-and-the-separation-of-powers>. accessed 15 May 2018.

<sup>1092</sup> Specifically, articles 2, 4, 18 and 30 of Law 26,855, which established a new regulation of the Council of the Judiciary of the Nation, and decree 577/13, which made the call for the election of candidates for directors.

<sup>1093</sup> The only dissident vote was the one of Eugenio Zaffaroni.

<sup>1094</sup> Principle number 16 aims to 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. Open discussions on this reform are available at the Ministry of Justice website: <https://www.justicia2020.gob.ar/> accessed 19 May 2018.

The transitional justice process in Argentina has also been significantly affected by the power retained by the security sector, particularly at its early stages as mentioned before. This is probably the main reason why there has not been a deep institutional reform in the Armed and Security Forces. While the military forces were considerably weakened, they were still in control of the State's coercive apparatus and the newly elected government was also constrained by the economic crisis inherited from the military regime. It has been argued that, due to the lack of reform in this field, repressive and violent practices on civil society actors and activists are still taking place.<sup>1095</sup>

Alfonsín implemented a reform of the Code of Military Justice in 1984 as part of his policy of accountability for military personnel involved in human rights violations.<sup>1096</sup> New laws gave civilian federal appeals courts the power to review the decisions of military tribunals. This measure certainly enabled the *Juntas Trials* to take place in a civilian court in 1985. However, the security system still presented many challenges regarding human rights and democratisation indicators. For instance, key aspects of the Code of Military Justice (Código de Justicia Militar) violated human rights and due process rights. Similarly, military personnel did not have the right to a lawyer, they were judged by their peers and the punishment for the most serious crimes<sup>1097</sup> was the death penalty.<sup>1098</sup>

Apart from initiatives specifically aimed at accountability for past human rights abuses, Alfonsín's administration also sent a series of bills to Congress seeking institutional and legislative reform. Amongst them, measures included reforms to punish the crime of torture with the same penalty as murder;<sup>1099</sup> to abrogate military jurisdiction for crimes committed in the future by members of the armed forces in

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<sup>1095</sup> See discussions around the effects of the lack of institutional reform of the security forces in their violent practices in CELS annuals reports from 2006 to 2017. Available at <https://www.cels.org.ar/web/publicacion-tipo/informe-anual/> accessed 19 May 2018.

<sup>1096</sup> Roniger, L., and Sznajder, M., *The Legacy of Human Rights Violations in the Southern Cone. Argentina, Chile, and Uruguay*, Oxford University Press, 1999, p. 59.

<sup>1097</sup> Such as treason, espionage, and mutiny.

<sup>1098</sup> While the death penalty is not technically a human rights violation, it was abolished in the civilian justice system in 1984. For a further analysis see Engstrom, P., 'Transitional Justice, Democratization and the Politics of the Death Penalty in Argentina', in Futamura, M. and Bernaz, N. (eds.), *The Politics of the Death Penalty in Countries in Transition*, Routledge, 2013, pp.47-67.

<sup>1099</sup> Law 23.097, October 1984.

connection with acts of service;<sup>1100</sup> and the abolition of the death penalty for ordinary crimes.<sup>1101</sup> It is worth noting in this sense that efforts to abolish the death penalty in the immediate transition to democracy aimed to point out the new government's commitment to break with the repressive laws and practices of previous political regimes. In fact, efforts to strengthen civilian control over the military branch were later crystallised in the reform of the Code of Military Justice.

In May 2003, Kirchner forced the military's top leadership to retire.<sup>1102</sup> Furthermore, the Ministry of Defence created a Directorate of Human Rights and International Humanitarian Law, where the main objective was to incorporate human rights in all aspects of Argentina's defense policy and to instill democratic values in the armed forces.<sup>1103</sup> Receiving and reviewing petitions related to violations presumably committed by military personnel was also part of the mandate. However, Macri's government seems to be reducing the scope and personnel of this Directorate.<sup>1104</sup>

A new Code of Military Justice was approved in 2008. This last reform eliminated the special jurisdiction of military tribunals, so civilian courts will now be the fora for crimes committed by members of the armed forces. Likewise, the new code also guarantees constitutional rights of due process, has eliminated discriminatory penalties related to homosexuality and abolished the death penalty for all crimes for members of the armed forces in both peacetime and in war. Similarly, Argentina also signed the Protocol to the American Convention on Human Rights to abolish the death penalty in December 2006 and ratified the protocol in June 2008. With these last incorporations, the death penalty was completely abolished in the Argentinian constitutional system, both for civilian and military crimes.

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<sup>1100</sup> Law 23.049, February 1984.

<sup>1101</sup> Law 23.077, August 1984.

<sup>1102</sup> *Pereira, G., and Engstrom, P.*, 'From Amnesty to Accountability. The Ebbs and Flows in the Search for Justice in Argentina', *op. cit.*, p. 114.

<sup>1103</sup> According to the Directorate's mandate 'the protection of human rights is one of the fundamental objectives of the new defence policy'. Decree 825/2005, available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/105000-109999/107842/norma.htm> accessed 19 May 2018.

<sup>1104</sup> See 'Repudiamos el vaciamiento del área de derechos humanos en el Ministerio de Defensa', Human Rights Organisations Press Release, 22 December 2017. Available at <https://www.abuelas.org.ar/noticia/repudiamos-el-vaciamiento-del-lrea-de-derechos-humanos-en-el-ministerio-de-defensa-929> accessed 19 May 2018.

While no specific institutional reforms aimed at addressing ESCRs past violations were adopted, legislative reforms in the field of labour rights and trade unions directly aimed at restoring rights lost under the dictatorship.<sup>1105</sup> Thus, Law No. 23.551 repealed in 1988 *de facto* restrictive norms of the past regime and reinstated collective bargaining. However, it is worth mentioning that economic institutional reforms implemented under Menem's administration profoundly affected the enjoyment of those rights. Together with the new economic plan, the government implemented a significant reshaping of the labour relations in Argentina: promoting private investment and labour flexibilization. While analysing economic policies and their social impact is beyond the scope of this thesis, it should be noted that the new model certainly affected the enjoyment of significant ESCRs, as it increased precarious labour and economic inequality.<sup>1106</sup> Regarding ESCRs, institutional reform could be a key dimension as it has the potential to trigger structural changes. However, as has been earlier demonstrated, it is one of the most under-researched and unexplored areas.<sup>1107</sup> As noted above, ESCRs have not been the focus of the transitional justice process in Argentina. Efforts have focused on body integrity crimes, so socioeconomic elements of the State repression and the role of the private sector have only received attention lately.

#### **VI.4 Corporate accountability and the transitional justice process in Argentina**

While different forms of corporate involvement in human rights abuses were evidenced during the first years of democracy, this issue has only recently received academic and political attention. As mentioned above, both CONADEP and Juntas' trials were focused on forced disappearances, killings and tortures. However, testimonies from victims –mainly workers- during the work of CONADEP and trials, revealed how companies' executives and owners were involved in disappearances and other human rights violations.<sup>1108</sup> Similarly, the report recorded labour rights violations

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<sup>1105</sup> The government drafted a bill to regulate trade unions, the so-called 'Ley Mucci', but it was never adopted. Original text of the proposal can be found here: <http://estudioslaborales.com.ar/contenidocelab/uploads/2014/02/Ley-Mucci.pdf> accessed 19 May 2018.

<sup>1106</sup> See for instance, Morero, H. A., 'Competividad y flexibilización laboral en la argentina de la convertibilidad', *Actualidad Económica*, Año XX, no. 72, 2010, pp. 9-30.

<sup>1107</sup> OHCHR Publication, 'Transitional Justice and Economic, Social and Cultural Rights', *op. cit.*, p.56.

<sup>1108</sup> The *Nunca Más* report also recorded the existence of a clandestine detention centre in the facilities of 'La Fronterita' Sugar Mill in Tucumán. See CONADEP Final Report, Part I The Repression, E. Description of Individual Secret Detention Centres.



and how some clandestine detention centres were inside some companies' facilities. Indeed, the Ford factory in *General Pacheco*<sup>1109</sup> was highlighted as a typical example of repressive activity on union delegates.<sup>1110</sup> In many cases, a few hours after the abduction, the company sent the worker's family a telegram stating that if they did not go to their job post, they would be fired.<sup>1111</sup>

Under the government of Cristina Kirchner, initiatives to analyse the role of the private sector in the dictatorship started to gain momentum. Scholars and practitioners published in 2013 the book 'Cuentas Pendientes: Los cómplices económicos de la dictadura Argentina' (The Economic accomplices to the Argentine dictatorship. Outstanding debts), edited by Horacio Verbitsky and Juan Pablo Bohoslavsky.<sup>1112</sup> Similarly, both scholars and practitioners elaborated a significant report entitled 'Reponsabilidad Empresarial en delitos de lesa humanidad. Represión a los trabajadores durante el terrorismo de Estado' (Corporate responsibility for crimes against humanity. Workers' repression under State terrorism), published in 2015.<sup>1113</sup> Furthermore, in November 2015, the Congress adopted the resolution to create a Bicameral Commission to investigate corporate complicity with the dictatorship.<sup>1114</sup> Different degrees and patterns of collaboration between companies and State apparatus have been evidenced, such as private banks that financed State terrorism,<sup>1115</sup> companies that have facilitated (or even requested) the disappearance of workers,<sup>1116</sup> and economic groups that have collaborated and obtained benefits from the appropriation of their competitors.<sup>1117</sup>

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<sup>1109</sup> In the province of Buenos Aires.

<sup>1110</sup> See CONADEP Final Report, Part II, The Victims, H. Trade Unionists.

<sup>1111</sup> *Ibid.* See also Centenera, M., 'Juicio a Ford Argentina por convertirse en centro de detención de la dictadura, El País, 20 December 2017. Available at [https://elpais.com/internacional/2017/12/19/argentina/1513717354\\_408056.html](https://elpais.com/internacional/2017/12/19/argentina/1513717354_408056.html) accessed 19 May 2018.

<sup>1112</sup> The Spanish version was published in Argentina in 2013 by Siglo XXI Editores. The English and updated version was published by Cambridge University Press in 2016.

<sup>1113</sup> Elaborated by CELS, FLACSO and the Truth and Justice Program and Secretary of Human Rights (both institutions belonged to Minister of Justice and Human Rights)

<sup>1114</sup> However, this Commission has not been yet established as noted before. The original approved text is available at [http://www.jus.gob.ar/media/1316031/proyecto\\_en\\_pdf.pdf](http://www.jus.gob.ar/media/1316031/proyecto_en_pdf.pdf) accessed 19 May 2018.

<sup>1115</sup> Such as Citibank, and Bank of America. See *Ibáñez Manuel Leandro y otros casos/Diligencia Preliminar*, Juzgado Nacional de 1º Instancia en lo Civil 34., Buenos Aires, N° 95.019/2009; *Garramone, Andrés c. Citibank NA y otros*, 2010, Juzgado Nacional en lo Contencioso Administrativo Federal N° 8, Buenos Aires, N° 47736/10. See also an *amicus curiae* on this topic <http://bit.ly/QmhFuU> accessed 19 May 2018.

<sup>1116</sup> Such as Ingenio Ledesma, or Mercedes Benz.

<sup>1117</sup> Such as the case of Papel Prensa.

Beneficial links and the effective involvement of some corporations in State repression are no longer in dispute, but rather the appropriate way to deal with it.<sup>1118</sup>

There have been some attempts to address corporate accountability for human rights abuses through criminal justice processes in Argentina, but prosecutions have been conducted against the corporate managers or businessmen, not against the company as an entity by itself. Corporate involvement has been generally categorised as complicity by the scholarship, considering the military government and forces as the main perpetrators of human rights violations. Therefore, businessmen prosecuted were also mainly charged as accomplices, as will be further analysed below. As with military criminal proceedings, initiatives to address corporate accountability in Argentina have been focused on crimes against humanity, which are considered the most serious human rights violations. Concerning the criminal notion of complicity, the Argentinean Criminal Code punishes anyone who helps or cooperates with the perpetrators of a crime, whether or not that collaboration was essential to the perpetration.<sup>1119</sup> Similarly, they punish anyone who motivates others to commit those crimes,<sup>1120</sup> those who benefit from the consequences of a crime, or who take part in an association formed to commit crimes, and anyone who can be directly considered the intellectual or material perpetrator of crimes.<sup>1121</sup> Shared intent with the main perpetrator is required. However, these provisions are only applicable to individuals, not legal entities.<sup>1122</sup>

Argentina's domestic criminal law provides for corporate criminal liability in relation to specific offences. Thus, it recognises corporate criminal responsibility only where explicitly provided for in the relevant sections of the penal code or specific statute which did not include the above-mentioned notion of complicity. In 2017, the

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<sup>1118</sup> For specific factual information about corporate involvement in State repression in Argentina, see the CELS archives on the topic. Available at <http://www.cels.org.ar/especiales/empresas-y-dictadura/#juicios-y-memoria> accessed 21 May 2018.

<sup>1119</sup> Sections 45 to 49, 210, 277 ff.

<sup>1120</sup> Originally referred to as instigators.

<sup>1121</sup> See for instance in this regard the charges against former Ford executives for their role as primary participants in the commission of serious crimes against plant workers; see *Riveros, Santiago Omar y otros s/unlawful deprivation of liberty, tortures, homicide.*, Juzgado Federal en lo Criminal y Correccional de San Martín no. 2.

<sup>1122</sup> Bohoslavsky, J.P., 'Corporate Responsibility for Complicity', in Verbitsky, H. and Bohoslavsky, V (eds.), *The Economic accomplices to the Argentine dictatorship. Outstanding debts, op. cit.*, p.135.

Congress passed the ‘Corporate Liability Bill’.<sup>1123</sup> According to the new law, legal entities may be sanctioned for the following corruption offences:

- (i) national and transnational bribery and influence peddling, (sections 258 and 258 bis Argentine Criminal Code)
- (ii) improper and unlawful transactions of public officials (section 265)
- (iii) illegal exaction committed by a public official (section 268)
- (iv) illicit enrichment of public officials and employees (section 268, subsections 1 and 2)
- (v) false balance sheets and reports (section 300)

According to the law, legal entities will be responsible for the offences detailed above, committed with their intervention, or in their name, interest or benefit.<sup>1124</sup> While the law also establishes the responsibility of the companies originating from mergers, acquisitions, or any other reorganization process, it provides for a special statute of limitations of six years to initiate the criminal action. Therefore, corporate criminal liability is limited to those specific actions.

Considering the above-mentioned procedural limitation, efforts then have been focused on prosecuting corporate individuals, thus, businessmen and companies’ managers who were involved in human rights violations. The lawsuit against *Mercedes Benz* production manager, Juan Tasselkraut, in 1999 was the first attempt of this nature. The action was brought in Germany on behalf of Héctor Ratto, on charges of collaborating and allowing the murder of other kidnapped victims.<sup>1125</sup> The German system had the same limitation as the Argentinian one regarding criminal liability of legal entities, so charges could be only filed against the manager. In November 2003,

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<sup>1123</sup> It entered into force 90 days after it was signed on 8 November, 2017. Original text available at [https://prelafit.cl/wp-content/uploads/2017/11/Ley\\_Responsabilidad\\_Penal\\_PJ\\_Argentina.pdf](https://prelafit.cl/wp-content/uploads/2017/11/Ley_Responsabilidad_Penal_PJ_Argentina.pdf) accessed 21 May 2018.

<sup>1124</sup> However, the legal person will not be prosecuted if the individual acted in his/her exclusive benefit with no profit for the company.

<sup>1125</sup> Mercedes Benz’s involvement in the State repression under the dictatorship has been deeply investigated by the German journalist Gabriela Weber, and her findings were laid out in two books and a documentary film. See Weber, G. *La conexión alemana. El lavado del dinero nazi en la Argentina*, Edhasa, 2005; Weber, *Die Verschwundenen von Mercedes-Benz*, Assoziation A, 2001; and the documentary *Milagros no hay. Los desaparecidos de Mercedes Benz* (color, 113 min., 2003; there is an updated version: 85 min., 2005).

the public prosecutor's office suspended the proceedings on grounds of insufficient evidence. However, a group of victims of *Mercedes Benz* initiated in 2002 legal proceedings in Buenos Aires. Drawing from evidence collected in the 'truth trials' held in La Plata,<sup>1126</sup> the company was accused of establishing a criminal alliance with then Labor Minister Carlos Ruckauf, and with the SMATA<sup>1127</sup> national leadership to kidnap and murder 'undesirable' trade union representatives. CELS also joined the action as a private prosecutor in representation of the company's group of victims.<sup>1128</sup> The Federal Criminal and Correctional Prosecutor's Office of the city of Buenos Aires<sup>1129</sup> concluded, after five years of investigations, that certain key representatives of *Mercedes Benz* and SMATA had been aware of the crimes. However, the court considered there was not enough evidence to prove their role in them.<sup>1130</sup> In 2004, a group of *Mercedes Benz* workers filed a civil lawsuit under ATS in the United States against *DaimlerChrysler AG*, the parent company at the time. They demanded economic reparations for the serious human rights violations in which the company was involved under State repression. While the case was dismissed in first instance, the court of appeals reversed the decision, and the U.S. Supreme Court agreed to hear the appeal, in 2013. On 14 January 2014, the Supreme Court reversed the federal appeals court decision, and ruled that *Daimler* did not have enough ties with the US for courts to hear the case.<sup>1131</sup>

The first businessmen convictions for their involvement in State repression in Argentina took place in 2012. Brothers Emilio Felipe and Julio Manuel Méndez were sentenced to eleven and fifteen years of prison for their contribution, which was providing the farm used as a clandestine centre, to the abduction and later murder of

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<sup>1126</sup> Within the context of Truth Trials in La Plata in 2001, Tasselkraut revealed the effects that the repression had on the company's internal operations. He was asked if he believed there was a link between the reduction in conflicts in the factory, the rise in productivity, and the disappearance of workers and trade unionists. He answered: 'Well ... there's no such thing as miracles'. Statement by Juan Tasselkraut in the Truth Trials (Juicios por la Verdad) held in La Plata, November 21, 2001.

<sup>1127</sup> Sindicato de Mecánicos y Afines del Transporte Automotor.

<sup>1128</sup> Case no. 17735/02, 'NN s. Asociación ilícita con peligro vigencia Constitución nacional. Homicidio simple, homicidio agravado'

<sup>1129</sup> Fiscalía Federal Criminal y Correccional de la ciudad de Buenos Aires

<sup>1130</sup> Kaleck, W., 'International Criminal Law and Transnational Business. Cases from Argentina and Colombia', in Michalowski, S. (ed), *Corporate Accountability in the Context of Transitional Justice*, *op. cit.*, p.183.

<sup>1131</sup> US Supreme Court, *Daimler AG v. Bauman*, No. 11-965, January 14, 2014, IV.B, p.23.

Carlos Moreno, the lawyer of the workers of the company *Loma Negra*.<sup>1132</sup> In the ruling, the Court ordered to promote a criminal investigation, suspecting that the crime had been induced by the company.<sup>1133</sup> Probably not surprisingly, the Office of Economic Research and Financial Analysis (OFINEC) detected that the firm reduced labor costs after the murder of Moreno. Furthermore, ‘the relationship between the labor cost and the positive results of the company experienced a 53% decrease during the dictatorship’, calculated the OFINEC, which Stated that ‘this regression of the employees’ participation in the total income of the company occurred in the context of union persecution, which included the kidnapping and subsequent murder of the labor lawyer Moreno who presented the lawsuits against the company *Loma Negra*’.<sup>1134</sup>

Some other criminal proceedings have taken place against companies’ executive managers and businessmen for crimes against humanity. In 2011, a public prosecutor in Jujuy called for a judicial investigation of the director and manager of the sugar company, *Ingenio Ledesma*. The prosecution against Carlos Pedro Blaquier and Alberto Lemos was focused on the kidnapping of four labor leaders from the Union of Sugar Workers and Employees of Ingenio Ledesma<sup>1135</sup> on March 24, 1976; and the detention and disappearance of at least twenty-six people<sup>1136</sup> who were kidnapped between July 20 and 27, 1976, during the power-cut nights that are remembered as the ‘Blackout Nights’.<sup>1137</sup> In both cases, company vehicles were used for the abductions. Despite facing several procedural obstacles, Blaquier and Lemos were brought to justice facing charges of first-order and second-order complicity, respectively, in the illegal

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<sup>1132</sup> *Tommasi, Julio Alberto, Pappalardo, Roque Italo; Ojeda, José Luís; Méndez, Emilio Felipe y Méndez, Julio Manuel s/privación ilegal de la libertad agravada, imposición de tormentos agravados y homicidio calificado*, 16 February, 2012, Cause n° 2473,. Available at <http://www.cij.gov.ar/nota-8789-Lesa-humanidad--condenaron-a-prisi-n-perpetua-a-tres-acusados-en-juicio-oren-Tandil.html> accessed 21 May 2018.

<sup>1133</sup> *Ignacio Aníbal Verdura, Loma Negra S.A. y otros s/privación ilegal de la libertad*.

<sup>1134</sup> ‘La trayectoria de la cuestión civil en el proceso de justicia argentino’ in CELS Annual Report, Derechos Humanos en Argentina, 2015, p.160. Available at <https://www.cels.org.ar/web/capitulos/la-trayectoria-de-la-cuestion-civil-en-el-proceso-de-justicia-argentino/> accessed 21 May 2018.

<sup>1135</sup> Sindicato de Obreros y Empleados del Azúcar del Ingenio Ledesma, SOEAIL.

<sup>1136</sup> The total number is still today uncertain

<sup>1137</sup> Further information about these events can be found at Gabriela A. Karasik, G.A. and Gómez, E.L., ‘La empresa Ledesma y la represión en la década de 1970. Conocimiento, verdad jurídica y poder en los juicios de lesa humanidad’, *Clepsidra. Revista Interdisciplinaria de Estudios sobre Memoria*, no. 3, 2015, pp. 110-131.

deprivation of freedom of twenty-nine people.<sup>1138</sup> However, in March 2015, the Federal Criminal Cassation Chamber adopted a decision reversing the confirmation of the indictment of the two accused. The Plaintiff and public prosecution appealed then to the Supreme Court. In January 2017, the Office of the Public Prosecutor established that sentences of the Federal Chamber of Criminal Cassation Lemos should be revoked.<sup>1139</sup> The Supreme Court requested the documents of the case to review it in August, 2017.<sup>1140</sup>

In March 2016, Marcos Levín, owner of la *Veloz Del Norte*, was sentenced to 12 years of prison for the illegal deprivation of liberty and torture, denounced by Víctor Manuel Cobos.<sup>1141</sup> The victim Stated that the events occurred in 1977 when he worked as a trade union delegate of the Tramway Automotive Union (UTA) at the company that Levin directed. Víctor Hugo Bocos and Enrique Víctor Cardozo were also prosecuted for the crime as co-authors. In 1977, Cobos had been arrested in the context of an alleged fraud trial, initiated by Levin against 15 employees. All were taken to the 4th Police Station in Salta, where they were tortured. The victims were forced to sign a Statement in which they accepted the charges and, subsequently, they were taken to prison.<sup>1142</sup> Prosecutors considered it proven that Levín not only demanded the intervention of the armed forces in a trade union conflict but he also ‘contributed,’ providing ‘intelligence information related to the workers’, such as the lists of the employees of the company, their personal addresses and data on their trade union

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<sup>1138</sup> *Fiscal Federal N° 1 solicita acumulación (AREDEZ, Luis Ramón y otros)*, Cause n° 047/12, 23 August, 2013. Available at <http://www.cij.gov.ar/nota-12049-Lesa-humanidad--confirmaron-el-procesamiento-de-Carlos-Pedro-Blaquier.html> accessed 23 May 2018.

<sup>1139</sup> See ‘Dictaminaron que deben dejarse sin efecto las sentencias de la Cámara Federal de Casación Penal que revocaron los procesamientos de Carlos Pedro Tadeo Blaquier y Alberto Enrique Lemos’, 2.01.2017, Available at <http://www.fiscales.gob.ar/lesa-humanidad/dictaminaron-que-deben-dejarse-sin-efecto-las-sentencias-de-la-camara-federal-de-casacion-penal-que-revocaron-los-procesamientos-de-carlos-pedro-tadeo-blaquier-y-alberto-enrique-lemos/> accessed 23 May 2018.

<sup>1140</sup> Corte Suprema de Justicia de la Nación, *Blaquier, Carlos Pedro Tadeo y Otros / Privación Ilegal De Libertad (Art.144 Bis Inc.1)*. 22 August, 2012. Cause FSA 44000195/2009. <http://www.cij.gov.ar/nota-27202-La-Corte-Suprema-pidi--a-la-Justicia-Federal-de-Jujuy-la-causa-en-la-que-se-investiga-al-empresario-Carlos-Pedro-Blaquier-por-cr-menes-de-lesa-humanidad.html> accessed 23 May 2018.

<sup>1141</sup> *Almiron, Víctor Hugo; Bocos, Víctor Hugo; Cardozo, Enrique Víctor and Levín, Marcos Jacobo s/privación ilegal de la Libertad agravada y tormentos agravados por tratarse la víctima de perseguido político; en perjuicio de Víctor Manuel Cobos*, 28 March 2016, Cause 4076/14. Original document available at <http://www.cij.gov.ar/nota-20568-Lesa-humanidad--condenaron-a-los-cuatro-acusados-en-un-juicio-oral-en-la-provincia-de-Salta.html> accessed 23 May 2018.

<sup>1142</sup> ‘D’Alessandri, Francisco Obdulio y otros s. privación ilegítima de la libertad’, 12 July 2013, Cause 8405/2010.

activity.<sup>1143</sup> The case of Cobos was categorised as a crime against humanity, due to his unionist condition, and the persecution of which he had been a victim of since before his kidnapping.<sup>1144</sup> The close relationship between Levin and the former commissioner Bocos were pointed out as a key element in the workers' repression. The sentenced constituted the first time in Argentina that a businessman was convicted for crimes against humanity committed during State repression to the detriment of its workers.<sup>1145</sup> However, the Federal Chamber of Criminal Cassation declared null the trial and annulled the convictions of businessman Marcos Levín in October, 2017. The Court Stated that the proven facts cannot be framed as crimes against humanity, omitting thus, the context of persecution against workers which was clearly manifested in the case of *La Veloz del Norte* by witnesses. This last sentence has been appealed to the Supreme Court of Justice by the plaintiff and public prosecution.<sup>1146</sup>

The involvement of *Ford Motors* has been also considered paradigmatic regarding corporate complicity with State repression. Between March and May of 1976, twenty-five workers were abducted, most of them members of the internal commission and the rest active unionists, who remained *disappeared* from thirty to sixty days. Some of them were seized directly at the factory, where they were held for hours and then taken to the Tigre police station which was a clandestine detention centre. Victims testified that they were picked up in trucks supplied by the company to the military. In addition, several testimonies pointed out that, besides actively supporting armed forces operations, the company asked them to kidnap workers and trade union delegates.<sup>1147</sup> With these operations, the company aimed to intimidate and discipline workers, so they

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<sup>1143</sup> A summary of the sentence can be found at 'Histórica condena en Salta a un empresario por crímenes de lesa humanidad', 28 March, 2016. <https://www.fiscales.gob.ar/lesa-humanidad/historica-condena-en-salta-a-un-empresario-por-crimenes-de-lesa-humanidad/> accessed 23 May 2018.

<sup>1144</sup> 'La trayectoria de la cuestión civil en el proceso de justicia argentino', *op. cit.*, p.157.

<sup>1145</sup> CELS Commentary to the case available at <https://www.cels.org.ar/web/2017/10/responsabilidad-civil-revoca-la-primera-sentencia-a-un-empresario-por-crimenes-de-lesa-humanidad/> accessed 23 May 2018.

<sup>1146</sup> 'Lesas Humanidad: apelan el fallo que anuló la condena al empresario Marcos Levín', La Gaceta Salta, 17 Oct 2017. Available at <https://www.lagacetasalta.com.ar/nota/91570/actualidad/lesa-humanidad-apan-fallo-anulo-condena-al-empresario-marcos-levin.html> accessed 23 May 2018.

<sup>1147</sup> For instance, Arcelia Luján de Portillo, the wife of one of the victims, Stated in her testimony that during a meeting she had with a military officer responsible for the kidnappings, whose last name was Molinari, the officer 'opened a drawer and pulled out a list typed on a sheet of paper with the Ford logo', which he told her had 'all the names that the company gave us of workers it wanted us to abduct'. See Basualdo, V., Ojea Quintana, T., and Varsky, C., 'The Cases of Ford and Mercedes Benz', in Verbitsky, H. and Bohoslavsky, JP. *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts*, *op. cit.*, p. 160.



did not claim for their salaries or improvement of their work conditions.<sup>1148</sup> A criminal case against three managers of the company, Pedro Müller, Guillermo Galarraga, and Héctor Francisco Jesús Sibilla, was built and the public oral trial was set for in 2014, but it was postponed due to procedural issues, but also because of dilatory tactics used by defendants.<sup>1149</sup> In December 2014, the trial court took in advance the testimony of two unionists because of their delicate health, who described how they were kidnapped and tortured inside the Ford factory.<sup>1150</sup> The Ford trial finally started on 19 December, 2017, against Pedro Müller and Héctor Francisco Jesús Sibilla.<sup>1151</sup> The third defendant died in 2016.<sup>1152</sup>

Recently, in 2018, The Prosecutor's Office requested the arrest of six businessmen from the *Ingenio La Fronterita*, accused of forced disappearance and arbitrary detentions during the dictatorship. During the 1970s, military forces installed a base at the factory grounds that functioned as a clandestine detention centre. Based on testimonies and administrative documentation, the prosecutor considered them accomplices of more than 60 kidnappings of sugar trade unionists, workers of the mill, their relatives and close neighbours and the disappearance of a dozen of them materialized by the Army between 1975, in the Operative Independence, and 1979.<sup>1153</sup>

Labor law has been also used in an innovative way to address corporate responsibilities in Argentina.<sup>1154</sup> In cases against *Techint SA* in 2012,<sup>1155</sup> and *SIDERCA* in 2007,<sup>1156</sup> victims' relatives claimed financial compensation from the companies for the disappearance of their loved ones, alleging corporate involvement in the crimes. In

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<sup>1148</sup> Interview with Tomás Ojea Quintana, Ford victims' lawyer. Buenos Aires, Argentine. August 2017

<sup>1149</sup> *Ibid.*

<sup>1150</sup> Basualdo, V., Ojea Quintana, T., and Varsky, C., 'The Cases of Ford and Mercedes Benz', in Verbitsky, H. and Bohoslavsky, JP. *The Economic Accomplices to the Argentine Dictatorship. Outstanding debts, op. cit.*, p. p.173

<sup>1151</sup> A Factsheet of the case can be found at <https://www.fiscales.gob.ar/lesa-humanidad/juicio-causa-ford-san-martin/> accessed 25 May 2018.

<sup>1152</sup> Then President of Ford Motors Argentina, Nicolas Enrique Courard, died in 1989.

<sup>1153</sup> See 'Los empresarios cómplices del terror', Página 12, 23 April 2018. Available at <https://www.pagina12.com.ar/110065-los-empresarios-compllices-del-terror> accessed 23 May 2018.

<sup>1154</sup> Payne, L.A., and Pereira, 'Accountability for Corporate Complicity in Human Rights Violations: Argentina's Transitional Justice Innovation?', *op. cit.*, p. 40.

<sup>1155</sup> The case known as 'Ingegnieros', in which María Gimena Ingegnieros, daughter of Enrique Roberto Ingegnieros requested financial compensation for her father's disappearance.

<sup>1156</sup> A case brought by Ana María Cebrymsky, the wife of Oscar Orlando Bordisso, who disappeared shortly after he left work in 1977.



the case of *SIDERCA*, the widow of a disappeared victim claimed compensation from employers under Argentine labor law, particularly arguing that the country's work safety law obliged the company to protect her husband on entering and exiting the work site.<sup>1157</sup> In both cases companies denied the claim and Stated that demands had a two-year statute of limitations that had long ago run out, but the court denied this argument declaring that statutes of limitation do not apply to compensation claims linked to crimes against humanity.<sup>1158</sup> However, as it has been already mentioned, later Supreme Court jurisprudence in 2017 reversed this conception. While civil responsibility seemed to open an option as a way to judicially address corporate accountability, given that actions can be brought also against accomplices (both for individuals or legal persons), this last jurisprudential line contended that actions for past crimes against humanity are subjected to the previous Civil and Commercial Code disposition which established a limit of two years.<sup>1159</sup>

The *Papel Prensa* case has been another example of addressing corporate accountability but with regard to illegal business transactions. Following the death in 1976 of David Graiver, owner of the *Papel Prensa* newsprint company,<sup>1160</sup> his brother and wife were allegedly threatened and pressured into selling the company to FAPEL.<sup>1161</sup> Subsequently, the three biggest Argentine newspapers loyal to the regime bought the company. Therefore, *La Nación*, *Clarín*, and *La Razón* secured their monopoly over news production.<sup>1162</sup> Investigations started in 2010 but they were been frozen for a while, until the Supreme Court confirmed the dismissals of the main defendants in December 2017.<sup>1163</sup> While some have argued that this case is an example of the Kirchner administration's political misuse of transitional justice instruments to

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<sup>1157</sup> Payne, L.A., and Pereira, 'Accountability for Corporate Complicity in Human Rights Violations: Argentina's Transitional Justice Innovation?', *op. cit.*, p. 41.

<sup>1158</sup> Crimes committed under State repression have been generally framed as crimes against humanity. See supra note 1021.

<sup>1159</sup> See supra note 959.

<sup>1160</sup> He died in an airplane crash. His death was matter of suspicion as Graiver had alleged links to the left-wing urban guerrilla Montoneros, which was opposed to the regime.

<sup>1161</sup> *Fábrica Argentina de Papel*

<sup>1162</sup> Payne, L.A., and Pereira, 'Accountability for Corporate Complicity in Human Rights Violations: Argentina's Transitional Justice Innovation?', *op. cit.*, p. 42.

<sup>1163</sup> See 'Papel Prensa: la Corte confirmó los sobreseimientos de Bartolomé Mitre y Héctor Magnetto', *Clarín*, 27 December 2017. Available at [https://www.clarin.com/politica/papel-prensa-corte-confirmo-sobreseimientos-bartolome-mitre-hector-magnetto\\_0\\_ryVUPMZXM.html](https://www.clarin.com/politica/papel-prensa-corte-confirmo-sobreseimientos-bartolome-mitre-hector-magnetto_0_ryVUPMZXM.html) accessed 23 May 2018.

punish the government's political opponents, others have seen it as an important case for addressing corporate wrongs of the dictatorship allies.<sup>1164</sup>

In summary, corporate involvement in the transitional justice process in Argentina has been mainly covered by truth and justice processes and mechanisms, as described within this section. They have produced different outcomes but they significantly provided visibility to victims and evidenced corporate involvement in human rights abuses, which has been a step forward in the pursuing of accountability. While truth mechanisms considered the role of corporations as entities in human rights abuses, prosecutions have been only conducted towards corporate managers but not to the company itself, due to the procedural limitations mentioned above. Despite the fact that the Argentinian criminal code has been recently amended to include corporate criminal liability, corporations still only must legally respond in a limited list of offences, which presents important challenges to holding them accountable for human rights abuses.

Reparations policy has been exclusively provided by the State, so no private actors contributed either financially or to its implementation.<sup>1165</sup> Nevertheless, some of these reparations affected the private sector, such as the Law 23.523, which established reincorporation of bank workers fired for political reasons; or Law 23.278, which affected those who were fired or forced to resign or forced into exile based on political or union activism.<sup>1166</sup> Similarly, some judicial rulings have ordered labour reparations to workers who were victims of State repression, such as the ones related to *Astillero Río Santiago*, *YPF*, *Propulsora Siderúrgica* and *Swift*.<sup>1167</sup> For instance, the court ordered *Astillero Río Santiago* to maintain economic remuneration for workers and family members entitled to a pension, until they can effectively access retirement. Likewise, it ordered the correction of the *legajos* (company's archives) 'to record the true reasons for the termination of the employment relationship'.<sup>1168</sup> The court also

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<sup>1164</sup> Payne, L.A., and Pereira, 'Accountability for Corporate Complicity in Human Rights Violations: Argentina's Transitional Justice Innovation?', *op. cit.*, p. 42.

<sup>1165</sup> Interview with Tomás Ojea Quintana, Ford victims' lawyer. Buenos Aires, Argentine. August 2017. See also, Guembe, M.J., 'Economic Reparations for grave human rights violations: the Argentinian experience', *op. cit.*, pp. 21-54.

<sup>1166</sup> The law established that the period of forced inactivity would be computed for retirement purposes.

<sup>1167</sup> *Vañek, Antonio y otros s. infracción al art. 144 bis inc. 1*. Cause nº 17/2012/TO1, 19 October, 2015.

<sup>1168</sup> *Ibid.*

exhorted the companies to allow the building of a memorial within their facilities to remember what happened with the workers of those companies under the dictatorship.<sup>1169</sup>

Concerning institutional reform, no specific initiatives have addressed the role and involvement of corporations in State repression under the Argentinian dictatorship. While vetting those who are guilty of human rights violations, including non-State actors, could be an effective means of ensuring non-recurrence and of strengthening the rule of law, these sorts of measures have not been implemented in the transitional justice process in Argentina.

As mentioned in chapter three, international concerns about how to deal with corporate-related human rights violations have been raised only recently, at least at institutional level.<sup>1170</sup> This could also serve to explain why corporate accountability for human rights abuses has not been a core issue within transitional justice processes. Given that corporations frequently conduct their operations in countries under conflict or repression, it could have been expected that the institutionalised field of business and human rights dedicate more attention to these issues. However, recent international developments in the field, such as the UNGPs, still hardly consider those delicate situations,<sup>1171</sup> and in any case, they only provide recommendations to business when conducting their operations in such contexts in order to avoid their involvement in human rights abuses. Similarly, little attention has been paid to this issue within the discussions on the content and nature of a future international treaty on business and human rights.<sup>1172</sup> The business and human rights debate therefore has failed so far to consider and discuss all the key issues that arise regarding corporate-related abuses in the transitional justice process, such as those that occurred in Argentina.

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<sup>1169</sup> CELS Report, Informe de Derechos Humanos en la Argentina, 2016. Siglo XXI Editores, p.45. Available at <https://www.cels.org.ar/web/wp-content/uploads/2016/12/IA2016-CELS-1.pdf> accessed 23 May 2018.

<sup>1170</sup> See Chapter III, Introduction.

<sup>1171</sup> Only Principle 7 makes some reference to these high-risk situations. See chapter III, section 3.

<sup>1172</sup> See Chapter Chapter III. 3.C and Chapter IV.2

## **VI. 5 Intermediate conclusions**

This chapter has addressed the different political stages of the Argentinian transitional justice process, as well as examined the mechanisms developed. It has contended that the use of different tools and the manner in which they were implemented responded to the political and social dynamics, being human rights organisations at the head of the accountability claims. Additionally, this chapter contended that the transitional justice process in Argentina has been traditionally focused on disappearances, as the cornerstone of social and judicial demands. Consequently, socioeconomic elements of the conflict, such as violations of ESCRs and corporate involvement, were regarded just as part of the context. Only recently has attention been paid to the role of companies in State repression, but transitional justice initiatives in this sense have produced mixed outcomes so far. Truth mechanisms addressed corporate involvement in repression, but they failed to give them a relevant place or to provide specific recommendations to hold them accountable. Similarly, justice mechanisms had to face procedural limitations, which impeded the holding of corporations liable as entities. While these obstacles hampered accountability claims, it does not mean that there are no other options to hold corporations accountable for past human rights abuses within transitional justice processes. Instead, reparations and institutional reform could have been used for this task; at the same time it would have helped to involve corporations positively in the post-dictatorship situation.

## CONCLUSIONS

Transitional justice is an eminently broad and complex field. Literature on the topic has significantly proliferated in recent years and involves different disciplines, such as law, economy, sociology and political sciences. While there are a number of sociopolitical elements and justice theories which directly influence transitional justice processes, it is widely accepted that confronting impunity, seeking redress and preventing recurrence of human rights abuses are the main goals of transitional justice, as well as facilitating social reconciliation.<sup>1173</sup> To achieve these aims, four main processes are usually implemented, each one with its own mechanisms. While the main mechanism of the truth process is the Truth Commission, the justice process involves domestic and international criminal and civil prosecutions. Similarly, reparations could have an economic and symbolic nature. Institutional reform, on the other hand, is the most under-researched and unexplored area, although it potentially has a great impact on avoiding recurrence.<sup>1174</sup> In this sense, as the UN has repeatedly pointed out, applying holistic and comprehensive approaches to countries experiencing transitional justice processes would present better and integral solutions to problems arising in transitional contexts.<sup>1175</sup>

Every single transition is unique. Domestic and international political, historical and sociocultural dynamics of each particular context certainly define the way in which transitional justice processes are designed and implemented. Thus, while past measures and mechanisms could inspire and be applied in future transitional justice processes, they will have to be tailored to the specific case in which they operate. If not tailored to context, the effectiveness of transitional justice mechanisms would be easily undermined by the specific situations which they need to deal with. However, while the specific goals of transitional justice processes would depend on the context, recognition

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<sup>1173</sup> UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *op. cit.*, p. 4.

<sup>1174</sup> OHCHR Publication, 'Transitional Justice and Economic, Social and Cultural Rights', *op. cit.*, p.56.

<sup>1175</sup> See for instance, OHCHR, *Rule of Law Tools for Post-Conflict States: Truth Commissions*, *op. cit.*, p. 9, or Guidance Note of the Secretary-General United Nations Approach to Transitional Justice, 2010, *op. cit.*, p.2.

of the dignity of victims, acknowledgement and redress for abuses and avoiding repetition are constant features, regardless of the specific circumstances of each case.<sup>1176</sup>

Whereas indivisibility and interrelatedness of all human rights have been well-proclaimed in IHRL,<sup>1177</sup> transitional justice processes have traditionally focused on the most egregious human rights abuses, which were often limited to bodily integrity violations such as killings, tortures, arbitrary detentions and disappearances. Socioeconomic aspects of conflict and authoritarianism have been thus disregarded, both at scholarship and practice level. However, many commentators have recently engaged in the complex debate as to whether transitional justice should and could incorporate ESCRs abuses and socioeconomic concerns.<sup>1178</sup> Those in favour argue that considering that economic inequality and interest often contributed to the outbreak of conflict or authoritarianism, longer-term and sustainable peace would require addressing these issues.<sup>1179</sup> Others, by contrast, contend that this inclusion would be too complex and deeply problematic as it would undermine the effects of transitional justice with unrealizable expectations.<sup>1180</sup> Similarly, they propose to leave this task to development programmes. Nevertheless, addressing many ESCRs violations can be relatively straightforward, particularly those related to negative State obligations<sup>1181</sup> and those which do not require significant State resources, such as specific labour rights.<sup>1182</sup> Therefore, addressing ESCRs violations would not need to unreasonably expand transitional justice mechanisms, neither would it generate unrealistic expectations.

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<sup>1176</sup> McGonigle Leyh, B., 'The Socialisation of Transitional Justice: expanding justice theories within the field', *op. cit.*, p. 84.

<sup>1177</sup> See for instance 'Vienna World Conference on Human Rights: Vienna Declaration and Programme of Action,' UN Doc. A/CONF.157/23. 12 July 1993. para. 5. Available at <http://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> accessed 26 May 2018. See also Laplante, L.J., 'On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development', *op. cit.*, pp. 141–177.

<sup>1178</sup> Also including structural violence, economic crimes, corruption and plunder as issues to be considered.

<sup>1179</sup> See for instance, Burke, S., 'Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights', *op. cit.*, p.493.

<sup>1180</sup> See for instance, Waldorf, L., 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', *op. cit.*, p.171.

<sup>1181</sup> As the negative obligation not to forcibly evict persons in violation of their right to adequate housing, for instance. Schmid, E., and Nolan, A., "Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice', *op. cit.*, p.17.

<sup>1182</sup> As the right to form and join trade unions and collective bargain. See OHCHR, 'Frequently asked questions on Economic, Social and Cultural Rights', *op. cit.*, p.15.

This author believes that while including the entire spectrum of ESCRs abuses in the transitional justice process would not be efficient, addressing specific ESCRs violations would be desirable. The selection of which violations should be incorporated in transitional justice mechanisms work would ultimately respond to prioritisation and it would depend on the specific case and capacities. Therefore, attention should be paid to the nature of violations, the contexts in which they were committed and the institutional resource constraints. As has been analysed in chapter four, Truth Commission, prosecutions, reparations programmes and institutional reform can be accommodated to include specific violations of ESCRs. Truth Commissions can identify ESCRs violations through testimonies and data collection; prosecutions can legally condemn those violations and provide redress; reparations programmes can remedy and correct the negative effects of such ESCRs violations; and through institutional reform, individuals and legal entities involved in ESCRs violations could be vetted and excluded from the sphere of the public institutions. Although some of them would need long-term planning and implementation to be addressed, others would be perfectly suitable and remediable to be addressed by transitional justice mechanisms.

Similarly, this work has argued that some misconceptions have led to wrong conclusions regarding the incorporation of ESCRs in transitional justice processes. ESCRs are just one element of the socioeconomic dimension of transitional justice. While it would be naïve to expect that the inclusion of ESCRs will resolve the full extent of the socioeconomic challenges at stake in post-conflict or post-authoritarian situations, including them according to their specific contexts could contribute towards such broader goals. As noted by Arbour, integrating ESCRs in transitional processes does not mean that transitional justice mechanisms should investigate and provide remedies for violations of these rights under all circumstances and unconditionally.<sup>1183</sup> Conversely, specific criteria grounded in solid theoretical and legal analysis and empirical research must be established to determine which violations should be addressed and at what priority level in each specific case. To this aim, it would be appropriate to give transitional justice mechanisms broad mandates, so specific priorities and areas of focus can be determined by them at operational level. Once again, limits will depend on the specific case and circumstances. Likewise, designing and

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<sup>1183</sup> Arbour, L., 'Economic and social justice for societies in transition', *op. cit.*, p. 13.

implementing development programmes together with transitional justice strategies so they can work combined could serve to strengthen both fields.

Corporate accountability for human rights abuses is a challenging and relatively new field of action. The notion of corporate complicity is nowadays used in a broader sense, not only confined to the specific meaning it possesses in criminal law, but referring to situations in which corporations becomes undesirably involved in something that another actor is doing. Applying it to the field of human rights, such use of the concept has provided a tool to capture in simple terms the fact that companies can become involved in human rights abuses, raising legal responsibility. However, the notion of corporate complicity has been left normatively undetermined at international legal level. Although some guidance notes, such as the one drafted by the former Special Representative of the Secretary General on Business and Human Rights, provide some orientation, legal boundaries of what constitutes corporate complicity are not well-established.<sup>1184</sup>

Since the States are the primary subjects of international law, there is a lack of enforcement mechanisms at international level for corporate human rights abuses. The ICC jurisdiction is limited to individuals, so international institutions do not provide any venue to attend to complaints about this issue to date. Likewise, the regional human rights courts neither have jurisdiction over corporate legal entities nor over individual corporate actors.<sup>1185</sup> Progressive developments, however, such as the adoption in 2011 of the UNGPs, are increasingly addressing these concerns. While being a *soft law* initiative, the UNGPs provided the first authoritative guidance on how companies should meet their human rights responsibilities. Moreover, they recognised that corporations are more likely to be involved in human rights violations in particular high-risks situations, such as under armed conflict or authoritarianism. While the UNGPs do not mention the potential links between the above-mentioned violations and transitional justice processes, it provides the opportunity for linking corporate accountability with transitional justice. These connections can especially be found in Principle 7, which recommends a high standard of corporate care because of the greater

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<sup>1184</sup> See Chapter III.2.

<sup>1185</sup> Kaleck, W and Saage-Maasz, M., Corporate accountability for human rights violations amounting to international crimes, *op. cit.*, p.710.



risks of those contexts. However, precisely within such high-risk contexts is the State duty to protect eroded by those special circumstances and other actors' involvement, such as corporations.

At domestic level, prosecutions of corporate entities are not possible in many national criminal jurisdictions. In other jurisdictions, claimants seeking redress must do so within the existing categories of wrongs that do not often adequately describe the gravity of the allegations or they even do not fit well into existing categories. Furthermore, while private law mechanisms are supposed to be accessory to public ones, they have been the main forum so far –particularly the ATS- to seek corporate accountability and reparation. However, private law mechanisms are not working well for victims either. Victims of human rights abuses face significant obstacles when bringing a civil law claim against corporate entities in virtually every jurisdiction. The high financial costs of litigation, the lack of availability of sufficient legal aid to fund the claim and the difficulties in finding suitably experienced counsel prepared to take conduct of the matter are just some of these obstacles. In this regard, it is worth mentioning that the United States is overwhelmingly dominant in the field of private redress mechanisms. This is mainly due to the flexible rules on jurisdiction and the availability of class actions and contingency fees that may help reduce the financial risks faced by claimants. However, actions brought in the United States under the ATS are already frequently dismissed on jurisdictional and other grounds, and are even more likely to be so in future following the Supreme Court's decision in *Kiobel v Shell*.

Additionally, initiatives such as the creation of an International Arbitration Tribunal on Business and Human Rights have been proposed by some civil society organisations in order to fill the accountability gap.<sup>1186</sup> But the main initiative in this respect is unquestionably the proposal for a binding treaty on business and human rights. It is widely expected that the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights will produce an international regulatory framework to ensure that corporate activity

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<sup>1186</sup> For further information about this proposal see Cronstedt, C., and Thompson R.C., 'A proposal for an International Arbitration Tribunal on Business and Human Rights', *International Jurisdiction for Corporate Atrocity Crimes*, vol. 5, 2016. Available at: [http://www.harvardilj.org/wp-content/uploads/Cronstedt-and-Thompson\\_0615.pdf](http://www.harvardilj.org/wp-content/uploads/Cronstedt-and-Thompson_0615.pdf) accessed 26 May 2018

does not conflict with enjoyment of human rights. However, little attention has been paid so far to transitional justice within the discussions on the content and nature of a future international treaty on business and human rights.<sup>1187</sup>

As noted earlier, corporations often develop their activities in conflict-affected zones or under repressive regimes. However, companies' involvement in human rights abuses committed in such contexts are usually not conceptualized as part of transitional justice. Therefore, businesses that actively support, benefit and/or participate in human rights abuses frequently enjoy impunity. Transitional justice has been traditionally focused on State-sponsored violence, so actors others than States have not usually been considered within the transitional justice mechanisms. Recognising the role of business in conflict situations and those under authoritarian regimes is crucial to properly address the root causes of violence and the possible links of complicity in human rights violations. Furthermore, given that economic actors, such as multinational corporations, are currently gathering power and strength and the division between State and non-State actors under international law has been thus undermined, transitional justice is being forced to address corporate-related human rights violations.

The primary goal of transitional justice is to address the legacies of past violence and human rights abuses and contribute to reconciliation through accountability. Moreover, as part of peacebuilding strategies, transitional justice should address deep-rooted causes of conflict, so conditions for violence would be resolved. Following this comprehensive conception of transitional justice entails considering the role of all actors involved in conflict or repression, including corporations. Including corporate accountability in transitional justice processes could potentially make a great contribution in terms of justice, but also facilitate the pathway to positive peace.

Different transitional justice mechanisms can be used to address corporate accountability in the transitional justice process. TRCs have been the main transitional justice tool used so far to consider corporate accountability and a socioeconomic background of conflict, given that they are able to create a historical account of the past. However, the attention that TRCs dedicated to corporations has not always been

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<sup>1187</sup> See Chapter IV.4.

successfully translated into practice, so recommendations in this sense have been often disregarded. In addition, whereas conducting prosecutions directly against corporations would be essential to dismantle the economic structures that made past human rights abuses possible and prevent such situations from recurring in the future, corporations are not criminally liable before the ICC,<sup>1188</sup> nor in many domestic criminal jurisdictions. However, individuals working for corporations could be criminally prosecuted, tried and punished when involved in past human rights abuses, although this solution might not deter wrongful corporate behaviour. Civil liability could be also a useful and complementary mechanism in this regard, but it also presents many limitations. Moreover, corporate accountability could be also addressed by reparation programmes, so companies can contribute to economic and symbolic reparations and hence, to rebuilding social prosperity and reconciliation. Likewise, vetting companies which contributed or benefited from past abuses would be possible within the framework of institutional reforms. Ultimately, there is not only one right approach or mechanism when addressing corporate accountability in transitional justice contexts. Rather, the combination of available tools in a complementary way would enrich and facilitate the task.<sup>1189</sup> The employment of different mechanisms would finally respond to the specific needs and circumstances of the case in which they have to be applied.

Besides analysing theoretical challenges of including corporate accountability and ESCRs in transitional justice, this thesis aimed to assess how this would work in practice. The case study, hence, serve as an illustration of what has been previously examined at the conceptual level. In this sense, Argentina represents an ideal case study given that it contains most parts of the factual elements which serve as basis to the theoretical framework analysed in sections one and two. It clearly illustrates the problems and challenges examined in these two sections, as well as inspiring some future legal solutions, discussed further below.

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<sup>1188</sup> Some commentators have proposed to adopt a Statute of the International Court of Human Rights to which NSAs, including corporations, could also possibly become parties in addition to States, in order to ensure more accountability for human rights violations by NSA. See for instance, Nowak, M., 'The Need for a World Court of Human Rights', *Human Rights Law Review*, vol. 7, no.1, 2007, 251–9 at 256–7.

<sup>1189</sup> Michalowski, S., and Carranza, R., 'Conclusion', in Michalowski, S. (ed.), *Corporate Accountability in the Context of Transitional Justice*, *op. cit.*, p.247.

The specific economic policy implemented under the last Argentinian dictatorship was directly linked to human rights violations. Aiming to develop a neoliberal economic policy, the military government set out to conduct a widespread disciplining of the Argentinian society, mainly driven by violent State repression and market violence. Apart from the systematic violence employed on political opponents, the Junta suspended political parties and trade unions' activities, as well as intervening and dissolving the most important trade unions and labour federations. Similarly, the right to strike was suspended in order to avoid workers' claims for labour and social rights. As analysed in chapter two, violations of certain labour rights, such as those referred to, can also produce a negative impact on the full set of rights, for instance, the right to an adequate standard of living, or even conduce to other serious violations such as the prohibition of forced and slave labour. All these restrictive measures were considered as necessary requirements to enforce the new economic plan.

Economic policies implemented under that period in Argentina substantially modified the paradigm of the country's economic power, directly benefiting a small elite of companies and economic groups closer to the regime. However, corporate involvement went beyond the mere passive economic benefit. The evidence gathered shows that the Armed Forces were supported by business action in complicity to exercise the repressive power against workers in the field of factories. Both the army and companies shared a common concern about the conflict between capital and labour. Consequently, repression was focused not only on dissents and radicalized political militancy, but also on disciplining the working class, which had accumulated political and social power over the previous decades. The national reorganization carried out by the dictatorship completely transformed the economic and social structure, severely attacked the source and level of workers' incomes and their living conditions and reproduction. It also promoted the substantial alteration of the labour and union regime that guaranteed then, the increase of the levels of exploitation, productive insecurity and pauperization.<sup>1190</sup> The case study, thus, has shown how corporations can be part and parcel of authoritarian regimes, as well as the relevance of ESCRs violations in such contexts. Therefore, corporate accountability and ESCRs violations should be part of transitional justice processes.

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<sup>1190</sup> See Chapter V.2.B and Chapter V.4.

The transitional justice process in Argentina, however, almost did not pay attention to these concerns. The main focus of the transitional justice mechanisms has been the phenomenon of forced disappearances. That exclusive focus reflected what was believed to be the main methodology of repression, while at the same time there was still hope that some of the disappeared might yet be found alive. Moreover, as it has been pointed out in this thesis, transitional justice has been traditionally focused on bodily integrity violations and State-sponsored violence. Therefore, it is not surprising that the attention to economic accomplices of the last dictatorship has been only recently raised. Both socioeconomic concerns and corporate involvement in State repression were revealed early on by the Argentinian Truth Commission, for instance, but they were conceived simply as part of the background in which repressive practices took place. Therefore, no specific recommendations were provided by the TRC regarding corporate involvement and ESCRs violations committed under State repression. Neither ESCRs violations nor corporate involvement in human rights abuses have been covered by transitional justice mechanisms in a comprehensive way in Argentina. This author believes that the relevance of bridging the gap between corporate accountability and ESCRs and transitional justice initiatives is evidenced through this case study, both at theoretical and practical level.

Notably, some prosecutions have been conducted against businessmen in recent years for crimes against humanity, but convictions have not been uniform. Civil actions again have been mainly enacted as subsidiary of criminal prosecutions for the same crimes. On the other hand, reparations policy has been entirely provided by State resources, and no specific reforms have addressed the involvement of corporations in State repression. It is worth noting that the whole transitional justice process was highly influenced by politics, so initiatives were designed and implemented depending on the political party in power at the particular moment. This author believes that in cases such as the Argentinian one, where it has been largely evidenced that specific corporations were substantial allies of the repressive regime and were involved in its abuses, they should have been included in the reparations policy. This inclusion would not only respond to economic reasons but also to make them participant of the society rebuilding. Corporate involvement in State reparations policy could have been channeled by administrative reparations program, public apologies and building memory monuments, or even creating a business trust which could contribute to

development and economic prosperity. Similarly, vetting those who are found guilty of human rights abuses, including corporations, must have been done in order to ensure non-recurrence and to strengthen the rule of law. However, it should be noted that implementing such measures is not an easy task when foreign and corporate investment is needed for economic prosperity.<sup>1191</sup>

Argentinian dictatorship and the subsequent transitional justice process illustrates corporate-related and ESCRs concerns and challenges examined in the theoretical part of this thesis, but it also could inspire some future solutions. The case of Argentina shows that inclusion of corporations and ESCRs could have been relatively straight-forward within its transitional process: ESCRs violations and the involvement of corporations were rapidly identified by the TRCs, which could have made recommendations to ensure accountability for past human rights abuses. Those recommendations could have been implemented through a reparations process but also within an institutional reform. Accountability through criminal and civil proceedings, however, is still more difficult to achieve in transitional contexts, given that legal actions are usually expensive and time consuming.<sup>1192</sup> In addition, criminal domestic legislations can impose limitations *ratione personae* and *ratione materiae* which can hinder legal prosecutions against corporations and for ESCRs.<sup>1193</sup> Consequently, with the current international legal landscape, it can be concluded that corporate accountability and ESCRs violations could be probably best addressed by non-legal transitional justice mechanisms. However, this does not exclude the idea that legal prosecutions could also contribute to achieve accountability, and even to make other

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<sup>1191</sup> This happened with the case of Ford. While in 2015 prosecution for crimes against humanity against former managers of Ford Motors were discussed, President Kirchner received executives of the company at the government palace. The company promised an investment of \$220 million. Interview with Tomás Ojea Quintana, Ford victims' lawyer. Buenos Aires, Argentine. August 2017. See also, 'Cristina Kirchner recibió a los directivos de Ford', *El Tribuno*, 29 May 2015. Available at <https://www.eltribuno.com/jujuy/nota/2015-5-29-0-0-0-cristina-kirchner-recibio-a-los-directivos-de-ford-economia-cristina-kirchner-ford-ford-argentina-unidad-de-pronta-atencion> accessed 26 May 2018.

<sup>1192</sup> In addition, as mentioned earlier in chapter III, no corporate criminal liability exists at international level, so corporations could be held liable only indirectly through their directors or managers as individuals. Furthermore, where criminal corporate responsibility exists, it is rarely used. Michalowski, S., and Carranza, R., 'Conclusion', in Michalowski, S. (ed.), *Corporate Accountability in the Context of Transitional Justice*, *op. cit.*, p.250.

<sup>1193</sup> See Chapter III.3.A and Chapter VI.3.B

transitional justice initiatives legally enforceable.<sup>1194</sup> Ultimately, using transitional justice mechanisms in a complementary manner would be desirable to approach ESCRs violations and corporate involvement in human rights abuses.

Future business and human rights' scenarios might include the adoption of a binding treaty. However, as mentioned earlier, in the deliberation and proposals on the content and nature of the future international instrument, little attention has been paid so far to corporate-related human rights abuses under dictatorships or armed conflict. It seems that transitional justice has not been to date a relevant issue within the discussions, but this author believes that if finally adopted, a binding treaty on business and human rights should certainly address corporate accountability in the transitional justice process. Specific provisions on this issue should explicitly include corporate obligations in such contexts, as well as to clearly define the legal boundaries of corporate complicity at international level when operating in countries under conflict or authoritarianism.<sup>1195</sup> While there is still no consensus on whether corporations should have direct international human rights obligations, it seems to be undeniable that corporate-related human rights abuses must not enjoy impunity. General initiatives in this sense,<sup>1196</sup> even if they do not clearly define the legal boundaries for corporations when involved in human rights abuses, seem to send them the implicit message that a business which does not respect human rights should no longer be a profitable one. In other words: respecting human rights is good business practice.

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<sup>1194</sup> For instance, legally establishing that corporations involved in human rights abuses must participate in reparations programmes.

<sup>1195</sup> Given that no corporate criminal liability exist at international level.

<sup>1196</sup> Such as the *Kimberly Process*, the *Voluntary Principles on Human Rights and Security* and even the *UNGPs*.





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## **Annex 1 - List of Interviews**

**ABUELAS** – Lawyer Pablo Lachener, 3 July 2017.

**Carolina Varsky**- CELS former lawyer, 2 August 2017.

**Emilio Crenzel** - University of Buenos Aires, Buenos Aires, August 2017.

**Graciela Daleo**- victim of state repression, 22 August 2017.

**Hector Recalde**- lawyer, 13 July 2017.

**Jaime Malamud-Goti** - Senior Presidential Advisor (1983-1987), Buenos Aires, Email interview, June 2017.

**Juan Pablo Bohoslavsky** - Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, email interview, 26 June 2017.

**Juan Pablo Fasano**- University of Buenos Aires, 25 August 2017.

**Judith König**, Oficina de Investigación Económica y Análisis Financiero (OFINE), 18 July 2017

**Leonardo Filipini**- University of Palermo and University of Buenos Aires, 23 June 2017.

**Marcelo Ferreira**- University of Buenos Aires, 27 June 2017

**Tomás Ojea Quintana**- Lawyer of FORD victims' of state repression, 4 September 2017

**Victoria Basualdo**- FLACSO Argentina, 3 July 2017.