

# N C H R

## OCCASIONAL PAPER SERIES

# 12 2019



**Business, Human Rights & Peace:**

**An Exploratory Study of the Role of Corporate  
Human Rights Practices and Corporate  
Accountability in the Promotion of Negative and  
Positive Peace, by**

**Elena Assenza**

**About the Author:** Elena Assenza holds a B.A. in International Affairs from the John Cabot University of Rome, Italy and a M.Sc. in the Theory and Practice of Human Rights from the University of Oslo, Norway (Faculty of Law, Norwegian Centre for Human Rights). She has been a visiting student at the University of Massachusetts (UMASS), USA and at the Universidade Paulista of São Paulo, Brazil.

During her undergraduate and graduate studies, she has interned for the Presidenza del Consiglio dei Ministri in Rome and collaborated with the Business for Peace Foundation of Oslo in the preparation of the 2018 Business for Peace Oslo Summit.

Her research interests include business and human rights, public international law and human rights law.

She is currently living in Brussels while undertaking a traineeship at the General Secretariat of the Council of the European Union for the Directorate-General Communication and Information.

She aims to pursue a Ph.D. in International Law and Human Rights.

**About the Series:** The NCHR Occasional Paper Series is an open publication channel reflecting the work carried out by the Centre as a whole on a range of human rights topics. It is published on an irregular basis, with contributions from NCHR's researchers, guests, master students, and the various international programmes and thematic working groups. The objective of the Series is to provide an insight into the work carried out at the Norwegian Centre for Human Rights, and disseminate it both internally and externally. It provides a way for NCHR's staff and students to publish relevant information in a freely accessible format. Its scope includes activity reports, thematic reports, conference/seminar papers, master theses, reflective essays or reports on completed projects. The papers are published by submission or invitation. The papers are published in the name of the author, and their views do not necessarily reflect those of the NCHR.

The content of this publication can be cited as long as the author and source are specifically cited.

Series Editor: **Stener Ekern**

**ISSN 2464-3297**

UiO • **Faculty of Law**  
University of Oslo

# **Business, Human Rights & Peace:**

**An Exploratory Study of the Role of Corporate Human Rights  
Practices and Corporate Accountability in the Promotion of  
Negative and Positive Peace**

HUMR5200

Master Thesis in the Theory and Practice of Human Rights



## **Acknowledgments**

Foremost, I would like to express my gratitude to my supervisor, Doctoral Research Fellow Ludovica Chiussi for the precious feedback and guidance provided in the past five months.

A special thanks also goes to my friends and colleagues at the Theory and Practice of Human Rights Programme. Thank you for the memories of these past two years.

Finally, I would like to thank my family and friends back home for always inspiring me and believing in me during the whole course of my studies.

## **List of Abbreviations**

<b>UNGC</b>	United Nations Global Compact
<b>UNGPs</b>	United Nations Guiding Principles
<b>UN</b>	United Nations
<b>GA</b>	General Assembly
<b>TNCs</b>	Transnational Corporations
<b>MNCs</b>	Multinational Corporations
<b>HRDD</b>	Human Rights Due Diligence
<b>HRIA</b>	Human Rights Impact Assessment
<b>TJ</b>	Transitional Justice
<b>TCs</b>	Truth Commissions
<b>ICC</b>	International Criminal Court
<b>ICJ</b>	International Court of Justice
<b>ATCA</b>	Alien Tort Claims Act
<b>UDHR</b>	Universal Declaration of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>SATRC</b>	South African Truth and Reconciliation Commission

## Table of Contents

<b>Acknowledgments</b> .....	<b>2</b>
<b>List of Abbreviations</b> .....	<b>3</b>
<b>PART ONE</b> .....	<b>6</b>
<b>1 Introduction</b> .....	<b>6</b>
1.1. Background.....	6
1.2. Research Questions & Objectives of the Study.....	8
1.3. Conceptual Framework.....	9
1.3.1. Fragile Areas: Conflict-Affected and High-Risk Areas.....	9
1.3.2. Business Actors of Transnational Character.....	10
1.3.3. Accountability & Complicity.....	10
1.3.4. Negative and Positive Peace.....	11
1.4. Theoretical Approach.....	12
1.5. Methodology.....	13
1.6. Reader’s Guide.....	14
1.7. Limitations.....	15
<b>PART TWO</b> .....	<b>16</b>
<b>2 Corporations, Human Rights Responsibilities and Peace in Fragile Contexts</b> .....	<b>16</b>
2.1. The Link between Human Rights and Peace.....	16
2.2. Corporations under International Human Rights Law.....	18
2.2.1. <i>Selected Regulatory Initiatives in the Context of Business and Human Rights</i> .....	19
2.3. The Risk of Corporate Complicity in Human Rights Violations.....	21
2.4. Human Rights Corporate Requirements in Fragile Contexts & Complicity.....	23
2.4.1. Human Rights Requirements in the UNGPs and UNGC: their Role in Preventing Complicity and Promoting Peace.....	23
<b>PART THREE</b> .....	<b>28</b>
<b>3 Corporate Accountability for Complicity and Promotion of Peace: the Realm of International Law</b> .....	<b>28</b>
3.1. The Relevance of Accountability for the Achievement of Peace.....	29
3.2. Complicity under International Law and its Applicability in the Context of Business	

and Human Rights .....	30
3.2.1. Complicity under International Criminal Law .....	30
3.2.1.1. <i>Actus Reus of Aiding and Abetting</i> .....	31
3.2.1.2. <i>Mens Rea of Aiding and Abetting</i> .....	32
3.2.2. Categories of Corporate Complicity in Human Rights Violations .....	33
3.2.2.1. <i>Direct Complicity</i> .....	34
3.2.2.2. <i>Indirect Complicity</i> .....	35
(a) <i>Beneficial Complicity</i> .....	36
(b) <i>Silent Complicity</i> .....	36
3.3. Accountability for Corporate Complicity and its Significance for Peace: Critical Analysis of the International Justice System and Positive Prospects .....	38
3.3.1. Limitations under International Criminal Law and Developments in National Law and International Human Rights Law .....	39
<b>PART FOUR</b> .....	<b>45</b>
<b>4 Corporate Accountability in the Context of Transitional Justice and Post-Conflict Promotion of Peace</b> .....	<b>45</b>
4.1. Conceptualizing Transitional Justice (TJ) .....	46
4.2. Why Linking Corporate Accountability to Transitional Justice is Relevant in Terms of Peace Promotion .....	48
4.3. The Role of Non-Judicial Mechanisms in Delivering Corporate Accountability and Fostering Peace: A Focus on Truth Commissions .....	50
<b>PART FIVE</b> .....	<b>57</b>
<b>5 Concluding Remarks</b> .....	<b>57</b>
<b>Table of References</b> .....	<b>60</b>

## PART ONE

### 1 Introduction

#### 1.1. Background

Starting from the 1990s, a fast process of expansion of business cross-border operations has been taking place worldwide – commonly referred to as ‘corporate globalization’<sup>1</sup>. As a result, the global reach of business actors has never been greater. Companies nowadays operate across the world. Their activities and supply chains touch all corners of the globe and, at the same time, “reach deep into the fabric of each of the world’s fragile and conflict-affected societies”<sup>2</sup>. Against the backdrop of globalization, business entities have become key contributors to economic growth and development, but also represent a pernicious variable in a number of vulnerable areas of the world, as “markets of now fragile countries are tomorrow’s emerging economies”<sup>3</sup>. Against this background, as a direct result of their operations in such areas, “businesses are faced with a host of decisions that could have an impact on exacerbation of conflict or creation and maintenance of peace”<sup>4</sup>.

As a consequence of the proliferation of business activities worldwide and of the increasing size of corporations, scholarly research has started to address the role of business actors operating in vulnerable regions in terms of conflict<sup>5</sup> and peace. In this context, scholars have expressed contrasting views on the nature of business actors *per se*. On the one hand, businesses have generally been regarded as mere economic actors “with no specific mandate to accomplish a public purpose”<sup>6</sup>. In other words, businesses are seen as strictly concerned with satisfying shareholders’ interests<sup>7</sup> and those operating in vulnerable areas are more likely to further instability by “exacerbating the tensions that produce conflict”<sup>8</sup>. On the other hand, a separate branch of scholarly literature has highlighted the ‘social’ role that business actors can play, *inter*

<sup>1</sup>Ruggie, *Just Business: Multinational Corporations and Human Rights*, (2014) 15.

<sup>2</sup>Peace Research Institute of Oslo (PRIO), *Business and Peacebuilding: Seven Ways to Maximize Positive Impact*, (2018) 10.

<sup>3</sup>Austin & Wennmann, *Business Engagement in Violence Prevention and Peace-building: the case of Kenya*, (2017) 451.

<sup>4</sup>Oetzel et al., *Business and Peace: Sketching the Terrain*, (2010) 357.

<sup>5</sup>Taka, *A Critical Analysis of Human Rights Due Diligence Frameworks for Conflict Minerals*, (2016) 186.

<sup>6</sup>Deva, *Regulating Corporate Human Rights Violations*, (2012) 4.

<sup>7</sup>Hiller, *A Co-opetition Approach to Business, Human Rights Organizations and Due Diligence*, (2014) 125.

<sup>8</sup>Van Dorp, *Multinationals and Conflict*, SOMO Report, (2014) 9.

*alia*, that of advancing peace. In this latter case, a number of academic studies has investigated the positive impact of economic entities, underlining how business actors “should not be excluded from the array of stakeholders working towards peace”<sup>9</sup>. The business actor in terms of ‘social actor’ is, thus, expected to provide a service to society<sup>10</sup>, having duties towards other stakeholders, and not just its shareholders<sup>11</sup>.

On a more negative note, many have been the instances of business actors operating in fragile areas of the world which have contributed to perpetuate conflict and/or escalate violence through acts of complicity in the human rights abuses carried out by non-state and state actors of host countries<sup>12</sup>. As a result, businesses operating in such contexts have increasingly been referred to as “spurs and generators of conflict”<sup>13</sup>, “critical part of the problem”<sup>14</sup>, and “source of all evil”<sup>15</sup>, reflecting the “negative symbiosis between conflict-affected weak governance and the worst abuses by business actors”<sup>16</sup>. Companies operating in fragile areas are likely to – and have been accused of – directly and indirectly exacerbating the conditions that lead to conflict – *inter alia*, human rights violations – in a number of ways, including: (a) offering support to state governments with appalling human rights records<sup>17</sup>; (b) providing financial and/or logistical support to non-state actors – such as rebel armed groups – most likely to carry out human rights abuses in the context of armed conflict<sup>18</sup>; (c) benefiting from the human rights violations of third actors<sup>19</sup>; and (d) turning a blind eye on the abuses taking place in host countries. As will be discussed in the thesis, all these circumstances can lead to allegations of

<sup>9</sup> Forrer et al., *How Business can Foster Peace*, USIP Report, (2012) 2; See also Bailliet and Larsen, *Introduction*, (2015) 10.

<sup>10</sup> Andreassen & Vinh, *Business Duties Across Borders: The New Human Rights*, (2016) 2-3.

<sup>11</sup> Hiller (n 7) 125. For more discussion on the role of business actors as ‘socially responsible’ see, *inter alia*, Sjaafjell, *Dismantling the Legal Myth of Shareholder Primacy: The Corporation as a Sustainable Market Actor* (2017).

<sup>12</sup> ‘Host country’ equals the host jurisdiction where businesses operate, different from their home jurisdiction (place of incorporation) or ‘home country’.

<sup>13</sup> Killick, *The Role of Local Business in Peacebuilding*, (2005) 3.

<sup>14</sup> Forrer et al. (n 9) 8.

<sup>15</sup> Leisinger, *On Corporate Responsibility for Human Rights* (2007) 1394.

<sup>16</sup> Ford, *Regulating Business for Peace*, (2015) 26.

<sup>17</sup> There exist extensive literature on this specific issue. See, among others, Martin-Ortega, *Business and Human Rights in Conflict*, (2008) 274; Ralph, *Peacemaking and the Extractive Industries*, (2015) 182.

<sup>18</sup> Khan, *Understanding Corporate Complicity: Extending the Notion Beyond Existing*, (2007) 1390; See also Roberts, *Corporate Liability and Complicity in International Crimes*, (2013) 192.

<sup>19</sup> Martin-Ortega (n 17) 275; See also Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, (2008) 900, and Clapham, *Corporations and Criminal Complicity*, (2011) 226.

‘corporate complicity’ in human rights violations, whose significance appears clear in terms of its potential to generate and/or perpetuate violence and conflict on the part of corporate actors.

In light of the discussion above, the thesis seeks to address: (a) the role of corporate human rights practices in the prevention of corporate complicity in human rights violations and in the promotion of peace; and (b) the role that effective accountability for corporate involvement in human rights abuses, pursued in judicial and non-judicial contexts, plays in advancing peace.

## **1.2. Research Questions & Objectives of the Study**

Although an extensive amount of research has focused on the relationship between business and human rights, and on some aspects of the business-peace nexus, a gap in the literature exists with regards to the systematic analysis of the relationship between the realm of international law applied to corporate actors and the promotion of peace. This aspect constitutes the main driving factor behind the choice of the thesis’ research topic.

In light of this, the present thesis explores the business, human rights and peace nexus from the point of view of international law. It does so by investigating how business human rights practices adopted in the context of business activities carried out in vulnerable areas<sup>20</sup> of the world and corporate accountability for human rights violations affect the two recognized dimensions of peace – namely negative and positive peace. Therefore, the main research question is formulated as follows:

- *What is the role of corporate human rights practices and corporate accountability for involvement in human rights violations in the promotion of negative and positive peace?*

The main research question will be split into a number of sub-questions, namely:

- *What are the human rights responsibilities of business actors in fragile areas and what role do corporate business practices observed in these contexts play on the maintenance of peace?*

---

<sup>20</sup> See Section 1.4.1.

- *What is the content of corporate complicity in human rights violations within the realm of international law and why is effective legal accountability for complicity relevant for advancing peace?*
- *What is the significance in terms of peace of including corporate accountability for complicity in the context of non-judicial mechanisms of transitional justice processes?*

Overall, the research seeks to contribute by offering new insights into the business, human rights and peace discourse and will be carried out through an exploratory and analytical study which investigates and assesses the role of corporate human rights practices and accountability on the promotion of peace, “by raising new questions and providing new explanations from a new angle, so that the observed makes more sense to the observer”<sup>21</sup>.

The research entails combining constitutive concepts of different fields of study, namely, legal and peace studies. More specifically, the thesis draws from international law applied in the context of business and human rights and investigates its significance in terms of the two dimensions of peace, as conceptualized in the field of peace studies. Ultimately, the research aims to highlight the nexus between disciplines that are usually regarded to have nothing in common.

### **1.3. Conceptual Framework**

The present section seeks to help the reader have a clear picture of the contextual framework of the discussion.

#### **1.3.1. Fragile Areas: Conflict-Affected and High-Risk Areas**

Terms such as ‘**vulnerable**’ or ‘**fragile**’ areas will be employed to describe the specific operating environment of corporate actors and encompass, in particular, ‘conflict-affected’ and ‘high-risk’ areas. While it is hard to find a widely shared definition of these, the one provided at the UN level will be adopted. Conflict-affected and High-risk areas include the whole range of contexts that<sup>22</sup>: (1) “may or may not be currently experiencing high levels of armed violence, but where political and social instability prevails”; (2) are likely to experience widespread

<sup>21</sup> Reiter, *Theory and Methodology of Exploratory Social Science Research*, (2017) 144. *Ibid.*

<sup>22</sup> UN Global Compact, *Guidance on Responsible Business in Conflict-Affected and High-Risk Areas*, (2010) 7; See also report by International Dialogue, *International Standards for Responsible Business in Conflict-Affected and Fragile Environments*, p. 1. Available at: [https://www.pbsdialogue.org/media/filer\\_public/6f/96/6f96d1ad-45bb-48ae-8614-8d84d6f7b2e9/id-rbc.pdf](https://www.pbsdialogue.org/media/filer_public/6f/96/6f96d1ad-45bb-48ae-8614-8d84d6f7b2e9/id-rbc.pdf)

human rights violations; (3) “are currently experiencing violent conflict, including civil wars, armed insurrections, inter-state wars and other types of organized violence”; (4) are transitioning from conflict to peace.

### 1.3.2. Business Actors of Transnational Character

The thesis focuses on one specific typology of business actors – transnational ones. These are defined as companies operating in two or more countries and “owning, controlling, or managing operations, either alone or in conjunction with other entities, in multiple jurisdictions”<sup>23</sup>.

**Business actors of transnational character** will be the primary focus of the following analysis for a number of reasons, *inter alia*:

- a. They are key actors in vulnerable areas of the world as result of “the process of globalization and expansion of economic linkages among countries”<sup>24</sup>.
- b. Due to their features – *i.e.* corporate structure and size – and nature of their business operations, they are more likely to influence third actors and to take part and/or be involved in their abuses<sup>25</sup>.

### 1.3.3. Accountability & Complicity

- (a) **Accountability**: in the present thesis, ‘accountability’ is adopted in the legal and moral connotations of the notion. In the legal sense, corporate accountability points to the way in which “private actors are answerable for their decisions and operations”.<sup>26</sup> More specifically, it reflects an actor’s (in this case a business entity) state of being liable and answerable for an action or activity carried out by the actor itself, and entails the enforcement of “specific legal standards that are internationally defined and implemented”<sup>27</sup> against the actor “that is found to have participated in human rights

<sup>23</sup> Preamble of the UN Draft Code of Conduct on TNCs (1987 Version); see also Deva (n 6) 21.

<sup>24</sup> Melin, *Business, Peace, and Politics: the Role of Third Parties in Conflict Resolution*, (2016) 493.

<sup>25</sup> Forrer et al. (n 9) 7. Extensive literature exists on the power of businesses and their capacity to influence states and societies. See, among others, Payne & Pereira, *Corporate Complicity in International Human Rights Violations*, (2016) 76-78.

<sup>26</sup> Morgera, *Corporate Accountability in International Environmental Law*, (2009) 19. See also Farah, *Toward a Multi-Directional Approach to Corporate Accountability*, (2013), 28.

<sup>27</sup> Morgera (n 26) 20.

violations, in order to provide a remedy”<sup>28</sup>. On the other hand, notwithstanding the prevalent legal dimension of the notion, one should bear in mind that ‘corporate accountability’ goes beyond, encompassing a moral dimension in accordance with one’s moral obligations.

- (b) **Complicity**: commonly, complicity “evokes a sense of participation in a wrongful act”<sup>29</sup>. From a legal perspective, complicity represents a ground for individual criminal liability<sup>30</sup> and encompasses the range of individual acts which might assist, abet, aid, and/or facilitate the commission of a crime, including providing the means for its commission<sup>31</sup>. The same notion applied to business actors is commonly referred to as ‘corporate complicity’ and it is adopted to encompass the involvement of business actors in violations carried out by third actors – actors other than the business entity itself, including state and non-state actors. Apart from the strictly legal connotation of the notion, the author at times refers to ‘complicity’ to simply reflect “the various ways in which companies become involved in undesirable ways in the perpetration of human rights abuses by other actors”<sup>32</sup>, unless otherwise stated.

#### 1.3.4. Negative and Positive Peace<sup>33</sup>

For the purpose of the present thesis, the classic differentiation between negative and positive peace advanced by sociologist John Galtung will be employed as working definition of peace. Accordingly, peace is a two-pronged concept. **Negative peace** points to the absence of personal violence or armed conflict<sup>34</sup>, albeit “inequalities and injustices remain, with structural and cultural violence continuing”<sup>35</sup>. **Positive peace** goes further, encompassing the absence of structural violence that causes inequalities<sup>36</sup>. The key distinction between the two dimensions of peace points to the fact that, while negative peace “does not lead to a positively

<sup>28</sup> Koska, *Corporate Accountability in Times of Transition: the Role of Restorative Justice in South African Truth and Reconciliation Commission*, (2016) 46.

<sup>29</sup> Clapham, *On Complicity*, (2002) 2.

<sup>30</sup> Clough (n 19) 905.

<sup>31</sup> Article 25 of Statute of the International Criminal Court (ICC).

<sup>32</sup> Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Vol No. 1, (2008) 3.

<sup>33</sup> Also discussed in previous research by the author, submitted to the University of Oslo (2018)

<sup>34</sup> Galtung, *Violence, Peace, and Peace Research*, (1969) 183.

<sup>35</sup> Ralph (n 17) 118.

<sup>36</sup> Galtung (n 34) 183.

defined condition”<sup>37</sup>, positive peace, shorthand for ‘social justice’, constitutes a positively defined condition<sup>38</sup>. Positive peace entails, *inter alia*, “cooperation between people and states, integration of human society, egalitarian distribution of power and resources, respect for human rights, elimination of structural violence”<sup>39</sup>, justice and accountability<sup>40</sup>.

It is well-established that business actors, including TNCs, are likely to exacerbate conflict, thus impairing the realization of negative peace, and to facilitate structural violence, which, in turn, prevents positive peace, whose realization would require “the removal of the immediate causes of direct violence and the structural and cultural roots of a conflict”<sup>41</sup>.

#### 1.4. Theoretical Approach

The major foundational pillar of the present thesis builds on the policy-oriented *New Haven School*, particularly with regards to the discussion on the differentiation between *subjects vis-à-vis participants* in international law<sup>42</sup>. Scholars affiliated to this doctrine have observed that the quest for identification of subjects of international law has no functional purpose and should be discarded as a whole, along with the concept of ‘legal personality’<sup>43</sup>. Instead, the emphasis should be put on “the *participants* in the process of international law-making”<sup>44</sup>. Accordingly, it is argued that “the concept of *subject* is too restrictive to encapsulate the multiple dimensions of that process and that a more dynamic concept like that of *participation* is needed to unravel these various fluxes in which law originates or which it contributes to generate”<sup>45</sup>. The present thesis, however, departs from this line of reasoning, contending that, in the specific context of business and human rights, the classification of corporate actors as *subjects* or *participants* in international law is ultimately not relevant in terms of their roles and functions, especially in the field of international human rights law. In other words, the controversy in establishing the status of corporate actors in the international

---

<sup>37</sup> *Ibid.*

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

<sup>39</sup> Bailliet & Larsen (n 9) 2.

<sup>40</sup> Garcia-Godos, *It’s About Trust: Transitional Justice and Accountability in the Search for Peace*, (2015) 325.

<sup>41</sup> Ralph (n 17) 118.

<sup>42</sup> d’Aspremont, *Non-state Actors in International Law: Oscillating between Concepts and Dynamics* (2011) 2.

See also Pentikäinen, *Changing International ‘Subjectivity’ and Rights and Obligations under International Law – Status of Corporations* (2012) 152.

<sup>43</sup> d’Aspremont, (n 42) 2.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

legal apparatus is not a reflection whatsoever of the responsibilities owned by these actors in the international field<sup>46</sup>.

### 1.5. Methodology

The thesis employs a combination of two methods, namely research of substantive legal and quasi-legal standards and literature review. The former will be conducted by way of examination of relevant instruments in the field of international law, mainly criminal law and human rights law. The latter will take the form of an analysis of relevant existing literature on corporate complicity, business and human rights, and corporate accountability. Although legal sources constitute the primary focus of the investigation, the present thesis goes beyond the simple explanation of the law *per se*. Instead, an examination of how the law applied in the context of corporate actors influences the promotion of peace is undertaken.

The research undertaken is mostly qualitative and the analysis employs both primary and secondary sources. Specifically, legal documents such as statutes, human rights standards and case law constitute the main primary sources and basis of the analysis while academic literature and institutional reports are employed as relevant secondary sources necessary to interpret and analyze the former.

**Sub-question #1** is addressed by way of a contextual and textual analysis of institutional regulatory initiatives, mainly non-binding soft law instruments on business and human rights such as the UN Guiding Principles and Global Compact. Such instruments are discussed and assessed in light of the role of corporate human rights responsibilities envisaged therein in preventing complicity, with a focus on vulnerable areas. **Sub-question #2** is addressed through an investigation of the notion of corporate complicity in international legal instruments and case law. Particularly, the Statutes of the major international criminal courts are valuable sources to discuss the normative content of complicity within the realm of international law. The analysis of the concept will be carried out with a focus on the relevance of effective accountability in terms of advancing peace. In this regard, the inadequacies and shortcomings of the current international justice system are assessed with regards to corporate accountability, and the analysis of domestic law and recent developments in human rights law is relevant as it discusses positive prospects for the future of corporate accountability and its implicit effect on

---

<sup>46</sup> Further discussed in Section 2.2.

the promotion of peace – *inter alia*, the thesis addresses the latest UN Draft Treaty on Business and Human Rights. Lastly, **sub-question #3** is answered by way of analysis of secondary sources, such as reports and academic literature, with the only exception of the Final Report of the South African Truth and Reconciliation Commission. These are employed to investigate the significance of including corporate accountability for complicity in human rights violations in processes of transitional justice, in terms of its role in post-conflict reconciliation and promotion of peace.

### **1.6. Reader's Guide**

The thesis is structured and proceeds as follows. Parts Two, Three and Four seek to answer the main research question by investigating respectively the three sub-questions introduced in Section 1.2.

Particularly, **Part Two** delves into the human rights responsibilities of business actors operating in vulnerable areas and the role of corporate human rights practices adopted in these contexts in the promotion of peace. **Part Three** provides an analysis of: (1) the nature and content of corporate complicity in the context of international law, with its features, modalities and legal implications; (2) the relevance of corporate accountability for human rights violations stemming from complicity in terms of peace and; (3) the jurisdictional shortcomings of the current international legal system in holding corporate actors accountable and developments under domestic and international law attempting to tackle the existing legal gap. **Part Four** explores corporate accountability in the specific context of transitional justice processes, with a focus on non-judicial mechanisms, investigating and assessing how: (1) the inclusion of corporate accountability in transitional justice processes might contribute to post-conflict promotion of peace and; (2) non-judicial contexts might be valuable tools in delivering accountability of corporate actors complicit in human rights abuses. **Part Five** provides final remarks and concludes the thesis.

## 1.7. Limitations

Three important limitations should be highlighted:

- (a) **Business and Peace:** evidence shows that economic entities are crucial players in the array of actors working towards peace. Empirical research conducted in this field has examined and highlighted how corporate actors are key in peacemaking and peacebuilding processes by way of promoting conflict prevention and mediation between warring parties. While this is true, the present thesis adopts a more theoretical approach to look at the means through which peace, in its abstract terms, can be advanced in the field of business, human rights, and law.
- (b) **Complicity:** the normative content of the notion of complicity is commonly examined to determine responsibility in two different areas of international law, namely, individual criminal responsibility and state responsibility. The present thesis does not address state responsibility stemming from complicity in human rights violations.
- (c) **Positive Peace:** as discussed in Section 1.4.4, the positive dimension of peace is made of a number of constitutive and interrelated elements. Among these, the present thesis principally focuses on justice and accountability as fundamental prerequisites for realization of peace.

## PART TWO

### 2 Corporations, Human Rights Responsibilities and Peace in Fragile Contexts

The present section of the thesis delves into the realm of business and human rights with a focus on assessing the potential role that corporate human rights practices adopted in vulnerable areas play in the promotion and maintenance of peace. Preliminary to this analysis, the following sections provide an overview of the intrinsic link between notions of peace and human rights; and discuss the status of corporate actors under international law and their human rights responsibilities in conflict-affected and high-risk areas – where the risk of allegations of corporate complicity is higher.

#### 2.1. The Link between Human Rights and Peace<sup>47</sup>

That human rights and peace are intrinsically connected and that they are vital to the realization and sustenance of one another has long been recognized in a number of contexts<sup>48</sup>.

One can generally acknowledge that human rights and peace are mutually-constitutive elements, in that a ‘state’ of peace is a key prerequisite for the enjoyment of individual human rights, while protection and respect for human rights are constituent elements of the process of bringing about peace. With regards to this latter point, more specifically, one can appreciate that respect for human rights plays a crucial role in the promotion of negative peace, by way of preventing exacerbation of violence leading to conflict; on the other hand, respect for human rights is one of the necessary preconditions of realization of positive peace<sup>49</sup>. As a result, scholars have noted that “there cannot be peace in a society in which human rights and the fundamental freedoms are mass-violated”<sup>50</sup>. In contrast, another long-established correlation is the one between human rights violations and conflict, given that human rights violations might

---

<sup>47</sup> See *supra* n. 33.

<sup>48</sup> See, among others, Engdahl, *Protection of Human Rights and the Maintenance of International Peace and Security: Necessary Precondition or a Clash of Interests?*, (2015) 109.

<sup>49</sup> Bailliet & Larsen (n 9) 3.

<sup>50</sup> Butcher & Hallward, *Bridging the Gap between Human Rights and Peace: an Analysis of NGOs and the United Nations Human Rights Council*, (2017) 83.

signal the likeliness of escalation of conflict, while threatening international peace, and conflicts, in turn, are very often accompanied by systematic human rights violations<sup>51</sup>.

In the more specific context of international human rights law, the intrinsic link between human rights and maintenance of peace has been identified in a number of instruments and standards. Foremost, it is established how individual human rights are essential preconditions and “foundations of freedom, justice and peace in the world”<sup>52</sup>, while peace has been acknowledged as the *conditio sine qua non* of human rights, given that it constitutes “a vital requirement for the promotion and protection of all human rights for all”<sup>53</sup>. Conversely, it has been stressed how “human rights violations and lack of accountability and prosecution for such violations are often drivers of conflict”<sup>54</sup> – as such, they can be deemed facilitators of the infringement of the negative dimension of peace. A similar line of reasoning has been adopted at the UN level by Secretary General Antonio Guterres who, in addressing the GA, has highlighted how “widespread human rights abuses can be an indicator of future instability or a harbinger of the imminent risk of violent conflict. Human rights can thus serve as a preventive tool for sustaining peace”<sup>55</sup>.

Overall, human rights are relevant to peace, and *vice versa*, “as an element by which to measure the risk of conflict, as a regime by which measure the effectiveness of transition to peace or consolidation of peace, and as a normative form of expression of peace itself”<sup>56</sup>. It also appears clear that respect for human rights and accountability might play an intrinsic, yet powerful role in sustaining peace. This understanding of the relationship between human rights and peace

---

<sup>51</sup> Butcher & Hallward (n 50) 82.

<sup>52</sup> Preamble of UDHR. See also Preamble of ICCPR: “Recognizing that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (1966). See also Art. 1(2) of the UN Charter: “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace” (1945).

<sup>53</sup> UN General Assembly (2017). *Declaration on the Rights to Peace*, A/RES/71/189, Art. 1.

<sup>54</sup> Athie & Mahmoud, *Human Rights and Sustaining Peace*. Report published by International Peace Institute (IPI), (2017) 1. Available at: <https://www.ipinst.org/2017/12/human-rights-and-sustaining-peace>.

<sup>55</sup> UN (2017), “Remarks to the General Assembly high-level meeting on Peacebuilding and Sustaining Peace”, available at: <https://www.un.org/sg/en/content/sg/speeches/2018-04-24/peacebuilding-and-sustaining-peace-remarks-general-assembly>.

<sup>56</sup> Bailliet, *Introduction: Researching International Law and Peace*, (2019), 3.

might well be applied in the context of corporate conduct in fragile areas, where business operations are more likely to have an impact on the individual enjoyment of human rights.

## 2.2. Corporations under International Human Rights Law

The ICJ, in its 1970 *Barcelona Traction* Judgement, highlighted how “corporate personality represents a development brought about by new and expanding requirements in the economic field”<sup>57</sup>. At the same time, the ICJ recognized that institutions of municipal law – *i.e.* corporate entities – “have an important and extensive role in the international field”<sup>58</sup>, thus, opening the door for the debate on the international legal personality of corporate actors<sup>59</sup>. At the present time, the question of ‘corporate legal personality’ still remains controversial and scholars have expressed contrasting views on the issue. On the one hand, many recognize the legal personality of corporate actors as an established notion of international law, so that it is regarded a “general principle of law recognized by civilized nations”<sup>60</sup>. On the other hand, many assert that the characterization of corporate actors as ‘*subjects*’ or ‘*persons*’ of international law should be abandoned altogether and replaced by the more practically useful and accurate designation of ‘*participants*’ in the international law-making process<sup>61</sup>. The difficulty in establishing the legal status of corporate actors should not be interpreted, however, as a denial of the rights and duties owned by these actors at the international level.

The renewed focus on corporate entities in the field of international law has been dictated by a number of reasons, *inter alia*, “corporate entities have managed to muster enough economic power to dwarf the power of certain States”<sup>62</sup>, and they have more than ever the capacity to affect in disastrous ways the enjoyment of human rights while conducting economic operations worldwide<sup>63</sup>. At the same time, the functions exercised by corporate actors have come to resemble those of governments<sup>64</sup>.

<sup>57</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, International Court of Justice (ICJ), 5 February 1970, para. 39.

<sup>58</sup> *Ibid.*, para 38.

<sup>59</sup> Karavias, *Corporate Obligations under International Law*, (2013) 1; see also Donohue, *Multinational Corporations and Human Rights Law: Problems and Proposals for Reform*, (2015) 77.

<sup>60</sup> Wilson, *Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act*, (2006) 53.

<sup>61</sup> Alvarez, *Are Corporations Subjects of international Law?*, (2011), 8-9.

<sup>62</sup> Karavias (n 59) 2.

<sup>63</sup> Wilson (n 60) 52; see also Donohue (n 59) 79.

<sup>64</sup> Karavias (n 59) 2.

In the context of human rights law, more specifically, the debate on the legal status of corporate entities has, *inter alia*, addressed the question of their human rights responsibilities and has attempted to provide and implement frameworks aimed at regulating corporate conduct with regards to human rights, as a response to the number of individuals and communities globally and adversely affected by the process of corporate globalization since 1990s<sup>65</sup>. While forty years ago it would have been unconceivable to contemplate corporate entities within the realm of international law in terms of ‘direct objects of regulation’, the past twenty-five years have witnessed the international community’s attempt to resort to international law to tackle adverse corporate conduct impairing the full enjoyment of individual human rights as a direct consequence of business activities carried out globally<sup>66</sup>.

In this sense, efforts have been made to regulate corporate behavior under human rights law. With this purpose in mind, these efforts have translated into the production and adoption of regulatory initiatives which have flourished either from internal or external sources. Specifically, in the former case, “violators themselves” have produced them, while in the latter “those organs of society which aim to protect human rights” have adopted them<sup>67</sup>. Both types of initiatives have, however, tried to exemplify the behavioral expectations and the human rights responsibilities of corporate actors in the context of business activities with regards to the protection of human rights.

For the purpose of the present thesis, two regulatory initiatives on business and human rights will be discussed with a focus on the responsibilities of corporate entities operating in particularly vulnerable contexts – conflict-affected and high-risk areas – and in light of their potential impact on the prevention of human rights violations stemming from complicity and, as a result, on the promotion of peace.

### *2.2.1. Selected Regulatory Initiatives in the Context of Business and Human Rights*

As noticed, a number of regulatory instruments have been endorsed at the international institutional level in the context of business and human rights. Therein, particular emphasis is also placed on the regulation of corporate conduct when business activities are carried out in fragile areas. Specifically, this section will take into account the *UN Global Compact (UNGC)*

---

<sup>65</sup> Ruggie (n 1) 16.

<sup>66</sup> Karavias (n 59) 2-3.

<sup>67</sup> Deva (n 6) 9.

and the *UN Guiding Principles on Business and Human Rights (UNGPs)*<sup>68</sup>, providing a brief overview of the two instruments as a starting point for the more in-depth analysis undertaken later in Section 2.4.

Established in 1999 as the “world’s largest global corporate citizen initiative”<sup>69</sup>, the *UNGC* provides guidance to corporate actors operating in line with ten principles developed by the UN and observing specific requirements in the areas of “human rights, labor, environment, and anti-corruption”<sup>70</sup>. The initiative was also thought to develop global standards which would help tackle the issue of corporate complicity in human rights violations in circumstances where business entities operate in fragile host countries<sup>71</sup>. Accordingly, the 2010 *Guidance on Responsible Business in Conflict-Affected and High-Risk Areas* issued by the *UNGC* offers an extra layer of cooperation to corporate actors and their stakeholders by helping them “implement responsible business practices in fragile contexts”<sup>72</sup>. Overall, the *UNGC* relies on principles of “public accountability, transparency and the enlightened self-interest of companies, labor and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact itself is based”<sup>73</sup>.

The *UNGPs* develop on the states’ duties and corporate responsibilities in the context of human rights and business activities. The initiative builds on the tripartite framework – Protect, Respect and Remedy – developed by Special Representative John Ruggie<sup>74</sup>. More specifically, the principles included therein highlight the state duty to protect against third parties’ human rights violations, including corporations; the corporate responsibility to respect human rights – that is, exercising due diligence and preventing human rights abuses linked to corporate global operations – and access to effective judicial and non-judicial remedies for

<sup>68</sup> One should also highlight the *1977 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* by the International Labor Organization (ILO) and the *2008 Guidelines for Multinational Enterprises* by the Organization for Economic Co-operation and Development (OECD).

<sup>69</sup> Martin-Ortega (n 17) 277.

<sup>70</sup> Rettberg, *Need, Creed, and Greed: Understanding why Business Leaders Focus on Issues of Peace*, (2016) 483; see also report by International Dialogue, (n 24) 4. Available at:

[https://www.pbsbdialogue.org/media/filer\\_public/6f/96/6f96d1ad-45bb-48ae-8614-8d84d6f7b2e9/id-rbc.pdf](https://www.pbsbdialogue.org/media/filer_public/6f/96/6f96d1ad-45bb-48ae-8614-8d84d6f7b2e9/id-rbc.pdf).

<sup>71</sup> Payne & Pereira (n 26) 67.

<sup>72</sup> Report by International Dialogue (n 22) 4.

<sup>73</sup> Chesterman, *Laws, Standards or Voluntary Guidelines?*, (2011) 54.

<sup>74</sup> UN Human Rights Council, *Protect, Respect and Remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 21 March 2011, A/HRC/17/31.

victims of corporate-related human rights abuses. Additionally, the framework develops extra responsibilities for corporate actors operating in the specific context of conflict-affected and high-risk areas, where the likelihood of corporate involvement in third parties' human rights abuses is higher.

### 2.3. The Risk of Corporate Complicity in Human Rights Violations

As a result of business operations carried out in fragile areas, corporations are likely to come in contact with local actors, including “political and military authorities, armed groups, other businesses, and powerful warlords”<sup>75</sup>. One, thus, understands how likely is for corporations operating in such contexts to get involved and/or taking part in human rights abuses carried out by third actors. As to this aspect, corporate actors have been oftentimes accused of involvement in human rights violations and breaches of international law by way of complicity when operating in host countries<sup>76</sup>.

It is important to specify, in light of the scope of the present thesis, that when we talk about corporate human rights violations, we mean that a company has either contributed to and/or facilitated the human rights abuses of third actors, given that states only can directly violate human rights *per se* and only states' human rights obligations derive directly from international human rights treaties<sup>77</sup>. Conversely, albeit corporate actors are not directly bound by international human rights treaties, their behavior and practices can still contribute to violations of state or non-state actors – by way of ‘corporate complicity’<sup>78</sup>. In other words, corporations do not perpetrate violations on their own, rather they “assist governments or other actors in violating human rights norms, or provide the opportunity for the violations”<sup>79</sup>, thus, operating as “secondary actors assisting the primary perpetrators”<sup>80</sup>. Corporate actors operating in host countries might be accused of being complicit in third actors' human rights violations under circumstances where<sup>81</sup>: (a) the company itself is not involved in the violation, albeit it

---

<sup>75</sup> Roberts (n 18) 190.

<sup>76</sup> *Ibid.*, 190.

<sup>77</sup> Chesterman (n 73) 56.

<sup>78</sup> Clapham (n 19) 225.

<sup>79</sup> Wilson (n 60) 55. See also Wettstein, *The Duty to protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*, (2010) 34.

<sup>80</sup> Clapham (n 19) 225.

<sup>81</sup> For an overview of circumstances in which corporations have been scrutinized for complicity in human rights abuses see Report by the International Commission of Jurists Expert Legal Panel on Corporate Complicity in

benefits from the abuses being committed<sup>82</sup>; (b) the company provides financial or logistical support to those carrying out the abuses<sup>83</sup>; (c) the company is under a legal duty to do something but fails to act in the face of abuses; or (d) the company “complies with national laws and policies which are clearly in violations of international human rights”<sup>84</sup>.

Along with the circumstances where corporations can be found complicit in human rights violations, scholars have identified a number of recurrent features shared by instances of complicity in the context of business activities carried out in host countries:

- (1) The actor accused of complicity is usually ‘a large and well-resourced’ multinational corporation<sup>85</sup>.
- (2) The human rights violations generally take place in the host country (host jurisdiction) where the MNC conducts its business activities, far from the MNC’s country of incorporation (home jurisdiction)<sup>86</sup>.
- (3) The host country is usually unable and/or unwilling to investigate and prosecute the human rights abuses and the actors involved, including corporate ones<sup>87</sup>. As noted by scholars, indeed, states might be reluctant to take action against corporate actors – be it investigating, hearing or enforcing human rights standards – “if they anticipate repercussions of appearing hostile to business, such as loss in foreign investment or

---

International Crimes, p. 1. Available at: <https://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf>

<sup>82</sup> Examples include US Oil Corporation *Unocal*, accused of benefiting from the forced labor provided by the Burmese Government (Now Myanmar) and other human rights abuses carried out by the military during the construction of the Yadana Pipeline. For discussion, see Clough (n 19) 900, and Martin-Ortega (n 17) 275. Another example is *Dabhol Power Corporation*, accused of benefiting from human rights violations carried out by police forces, such as suppression of dissent and harassment of protest leaders and environmental activists. See, in this case, Clapham (n 19) 226.

<sup>83</sup> This is particularly common in the context of armed conflicts, where corporations might provide support to armed groups, facilitating their human rights abuses. For instance, companies specialized in the trade of diamonds have been accused of financing rebel groups in resource-rich countries, including Angola and the Democratic Republic of Congo (DRC), directly perpetuating conflict. See Martin-Ortega (n 17) 275; and Papaioannou, *The Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: A Case Study on Corporate Complicity in Human Rights Abuses*, (2006) 271. Corporations have also supported state human rights abuses. An example is Canadian energy company *Talisman*, accused of complicity in human rights abuses by Sudan, including displacing population and providing revenues to the government, which sustained hostilities during the country’s internal civil war. See, in this case, Clough (n 19) 901 and Ralph (n 17) 182.

<sup>84</sup> Khan (n 18) 1390.

<sup>85</sup> Clough (n 19) 901-902.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

business relocation to more permissive environments”<sup>88</sup>. Let alone if host states themselves are involved as primary perpetrators of abuses in which corporate actors are complicit<sup>89</sup>.

- (4) The MNC is accused of complicity in the human rights violations “either directly or through the interposition of subsidiaries or other intermediaries”<sup>90</sup>.

## **2.4. Human Rights Corporate Requirements in Fragile Contexts & Complicity**

### **2.4.1. Human Rights Requirements in the UNGPs and UNGC: their Role in Preventing Complicity and Promoting Peace**

Recalling that human rights violations are likely to fuel and/or further conflict, companies complicit in the human rights violations of state or non-state actors implicitly contribute to support and perpetuate conflict – thus, leading to a direct infringement of peace in its negative dimension. Against this background, one may contend that corporate actors adopting responsible human rights practices aimed at preventing the risk of being complicit in human rights violations, while conducting business activities in fragile areas, might indirectly prevent exacerbate violence leading to conflict in response to human rights abuses – therefore, transversally sustaining peace in the form of absence of violence and conflict.

As anticipated, a number of institutional initiatives on business and human rights have been adopted in order to regulate corporate conduct with respect to human rights. The regulatory attempts aim to provide guidance to business entities on human rights responsibilities and practices to be observed, clarifying, *inter alia*, the expected conduct of corporations undertaking business operations in conflict-affected and high-risk host countries. In these contexts, as discussed, the likelihood that widespread human rights violations are perpetrated and that corporations are found complicit in the abuses of state actors or armed groups is substantial. Having said this, the starting point for the analysis that follows is the assumption that business actors that observe the requirements envisaged in business and human rights regulatory instruments – foremost human rights due diligence (HRDD) requirements – can implicitly lower the likelihood that they will take part and/or be involved in third actors’

---

<sup>88</sup> Payne & Pereira (n 25) 76.

<sup>89</sup> Richardson, *Corporate Crime in a Globalized Economy: An Examination of the Corporate Legal Conundrum and Positive Prospects for Peace*, (2004) 172; see also Chesterman (n 73) 51.

<sup>90</sup> Clough (n 19) 901-902.

abuses. As a result, one might expect that, while fulfilling their responsibility to respect human rights, corporate actors can implicitly prevent exacerbating the conditions that lead to or perpetuate conflict – human rights violations, *inter alia* – thus, ultimately contributing to sustain negative peace where they operate.

The discussion undertaken in the present section focuses on requirements for corporations operating in vulnerable areas included in the *UNGPs* and the *Guidance on Responsible Business in Conflict-Affected and High-Risk Areas* developed by the *UNGC*, and provides an analysis of relevant human rights requirements – including due diligence – assessing their potential role in promoting peace. Among others, these instruments are to help corporate actors avoid complicity in human rights abuses carried out by local actors. They are also a reminder for corporate actors not to knowingly take part in abuses, recognizing that they might incur allegations of complicity even when failing to act in the face of violations or indirectly benefit from them<sup>91</sup>.

The *UNGPs*, as stated earlier, have come to be recognized “a universally accepted frame of reference regarding corporate human rights obligations”<sup>92</sup>. For the purpose of assisting business actors avoid being complicit in the human rights violations of third actors, the *UNGPs* stress – among other human rights practices central to corporate responsibility to respect human rights – the requirement to exercise human rights due diligence (HRDD), which includes “the steps a company must take to become aware of, prevent and address adverse human rights impacts” – therefore to “do no harm”<sup>93</sup>. Most importantly, in the context of business operations carried out in conflict-affected areas, human rights due diligence practices become extremely relevant given that these operating environments “may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors”<sup>94</sup>. HRDD – along with identifying and addressing existing and potential adverse human rights impacts – is ultimately envisaged to help corporations reduce (if not avoid) complicity which, as defined by the Framework, arises when “a business enterprise contributes to, or is seen as contributing to,

<sup>91</sup> Commentary to Principle 2 of UN Global Compact, available at: <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>. See also *UNGPs*, UN Doc. A/HRC/17/31, Commentary to Principle 17.

<sup>92</sup> Van de Sandt & Moor, *Peace, Everybody's Business! Corporate Accountability in Transitional Justice: Lessons for Colombia*, Report by Pax, (2017) 13.

<sup>93</sup> *UNGPs*, UN Doc. A/HRC/17/31, Principle 17; see also McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Principles and Challenges for Business Enterprises*, (2017) 196; Taka (n 5) 186.

<sup>94</sup> Davis, *The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities*, (2012) 976. See also *UNGPs*, UN Doc. A/HRC/17/31, Commentary to Principle 23.

adverse human rights impacts caused by other parties”<sup>95</sup>. At the same time, HRDD is expected to help corporate actors that operate in weak governance zones “address legal risks by showing they undertook serious steps to avoid involvement in human rights abuses perpetrated by third actors”<sup>96</sup>. With regards to this latter point, the ‘Ruggie Framework’ envisages that corporations operating in conflict-affected and high-risk contexts should have in place human rights impact assessment mechanisms (HRIAs) which would allow the identification of those adverse impacts likely to translate into violations and that “business enterprises may cause or contribute to through their activities, or which may be directly linked to their operations, products, or services by their business relationships”<sup>97</sup>.

In a similar vein, the *UN Guidance on Responsible Business in Conflict-Affected and High-Risk Areas* by the *UNGC* stresses the responsibility of corporations operating in vulnerable contexts to identify and address the impacts that their operations and/or investments might have on conflict – *i.e.* to exercise due diligence<sup>98</sup>. Furthermore, along the same lines of the *UNGPs*, corporations with business activities in conflict-affected and high-risk areas should have in place systems that allow them to “monitor business relations, transactions, and flows of funds and resources to ensure that they are not implicitly providing funding or support to armed groups”<sup>99</sup>. At the same time, businesses are expected to avoid being complicit in human rights violations<sup>100</sup> by way of, *inter alia*, “identifying those functions within the firm that are most at risk of becoming linked to human rights abuses, as well as conducting human rights impact assessments as part of due diligence practices”<sup>101</sup>. Overall, corporations observing due diligence requirements while conducting business operations in host countries are expected to be shielded against the risk of taking part and/or being involved in human rights abuses committed by third actors – *i.e.* corporate complicity. As specified by the *UNGC*, “the risk of an allegation of complicity is reduced if a company has a systematic management approach to

<sup>95</sup> *UNGPs*, UN Doc. A/HRC/17/31, Commentary to Principle 17.

<sup>96</sup> Ralph (n 17) 47.

<sup>97</sup> *UNGPs*, UN Doc. A/HRC/17/31, Principle 17(a).

<sup>98</sup> *UNGC and PRI (2010) Guidance on responsible business in conflict-affected and high-risk areas: a resource for companies and investors*, Guidance Point #1.

<sup>99</sup> As noted earlier, this would directly translate into a form of complicity if human rights violations carried out by non-state actors are facilitated by the financial and/or logistical support of corporate actors. See *UNGC and PRI* (n 97), Guidance Point #5.

<sup>100</sup> *Ibid.*, Guidance Point #2.

<sup>101</sup> Commentary to Principle 2 of *UNGC*, available at: <https://www.unglobalcompact.org/what-is-igc/mission/principles/principle-2>

human rights, including due diligence processes that cover the entity's business relationships"<sup>102</sup>. Similarly, observance of the *UNGPs* is expected to shield companies against corporate complicity – though not complicity liability – “by exercising appropriate due diligence [...] so that companies can become aware of, prevent and address human rights risks”<sup>103</sup>.

To come to the point, once discussed the requirements included in the two initiatives, one might suggest that human rights corporate responsibilities, foremost due diligence ones, translate into extremely crucial tools in the prevention of corporate complicity, while representing an implicit means to sustain negative peace by way of lowering the likelihood of human rights violations which, in turn, might generate violence and/or perpetuate conflict. This is to say, human rights practices, and, in particular, due diligence requirements, are to be adopted by corporate actors as a preventive tool against their potential involvement in third actors' human rights violations which might directly produce and perpetuate tensions leading to conflict. By way of example, *inter alia*, in the context of internal armed conflicts in the Democratic Republic of Congo (DRC), empirical research has showed how the involvement of business entities in human rights violations perpetrated by armed groups “has been instrumental in the prolongation of the war itself”<sup>104</sup>.

Against this backdrop, the preventive effect of due diligence practices appears straightforward when corporate actors operating in areas where the likelihood of conflict is substantial are able to identify those functions, operations, and activities that are most likely to produce violence or to be linked to human rights abuses. As anticipated, the implicit contribution to lowering the likeliness of human rights violations is also an indirect contribution in terms of preventing violence and conflict, a shorthand for the promotion of negative peace. Indeed, provided that corporate actors adopting due diligence practices – among other human rights practices – are able to identify human rights risks and avoid contributing to human rights abuses – commonly

---

<sup>102</sup> Commentary to Principle 2 of *UNGC*, available at: <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>

<sup>103</sup> Michalowski, *Due Diligence and Complicity: a Relationship in need of Clarification*, (2013) 222-223.

<sup>104</sup> Papaioannou (n 83) 271.

signaling “future instability or an imminent risk of violent conflict”<sup>105</sup> – they are indirectly contributing to lower the likelihood that tensions and conflict will come about on their part.

Overall, given that one of the objectives of the thesis is examining the role of business human rights practices in the promotion of peace, the research suggests that human rights requirements envisaged under international law and in the context of business operations carried out in weak governance zones can in theory have an intrinsic impact on peace. However, the analysis provided throughout this section focuses solely on the negative dimension of peace, the one which translates into absence of violence and armed conflict, as explained. Business actors observing human rights frameworks are in a strategic position to prevent human rights violations – including those directly stemming from complicity in third actors’ abuses – by assessing “whether they might contribute to abuse through relationships connected to their activities, such as with state and non-state actors”<sup>106</sup>.

Eventually, the present thesis advances the following claim. Inasmuch as observance of human rights due diligence helps avoid corporate complicity in abuses, which are likely to fuel or sustain violence and conflict, then one may assume that, while upholding human rights responsibilities outlined in international regulatory standards – particularly due diligence requirements –, corporate actors might have an implicit, yet significant impact in lowering violence and/or conflict by way of avoiding perpetrating abuses, *i.e.* implicitly sustaining negative peace. In other words, it is contended that business actors can promote negative peace through the realm of human rights law by way of adopting responsible practices aimed at avoiding human rights violations, especially those stemming from their involvement in third actors’ wrongdoings.

---

<sup>105</sup> Athie & Mahmoud (n 54) 2.

<sup>106</sup> Michalowski (n 103) 222-223.

## PART THREE

### 3 Corporate Accountability for Complicity and Promotion of Peace: the Realm of International Law

The third macro section of the present thesis explores the notion of complicity and corporate accountability for complicity in human rights violations within the realm of international law, and assesses the role that accountability and rule of law play on promotion of peace<sup>107</sup>. To this end, the following sections firstly provide an examination of the constitutive elements of complicity as envisaged in international legal instruments and as dealt with in case law, and look at how the notion is applied to corporate actors in the context of business and human rights. The analysis of the normative content of complicity lays the foundations of the discussion on the issue of legal accountability for corporate actors complicit in human rights violations of third actors. Therefore, with this purpose in mind, the thesis also provides a critical analysis of the current international justice system entrusted with holding actors accountable for human rights abuses, highlighting the inadequacies of that system with respect to corporate actors complicit in violations of international law, and analyzing the role that domestic law and recent developments under international human rights law might play in tackling its shortcomings.

The underlying argument of this macro section points to the urgency of addressing corporate accountability for human rights complicity from a legal perspective as an essential component of promoting peace<sup>108</sup>, especially in conflict-torn and high-risk areas where corporate human rights violations are more likely to occur and corporate actors to escape accountability. In other words, it is contended that a legal understanding and refinement of the issue of corporate complicity and corporate liability for involvement in human rights abuses is extremely relevant to the promotion and realization of peace in its negative and positive dimensions.

---

<sup>107</sup> Zyberi, *The Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest*, (2015) 344. Here it is asserted that “the reign of law is an essential condition of peace”.

<sup>108</sup> Recalled, *inter alia*, by UN High Commissioner for Human Rights. Speech available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24490&LangID=E>

### 3.1. The Relevance of Accountability for the Achievement of Peace

It is widely established in scholarly literature that accountability for human rights violations, including corporate violations in the context of business activities carried out in fragile areas, is “an indispensable component of peace and eventual reconciliation”<sup>109</sup>, therefore, the role that accountability might play in advancing peace cannot go unnoticed<sup>110</sup>. In the context of conflict-affected and high-risk areas, accountability plays a major role given that it can substantially facilitate “the pursuit of long-term peace by contributing to rebuild relations of trust in post-conflict societies”<sup>111</sup>. As scholars have pointed out, if one understands positive peace as a synonym of “political and social transformation based on the rule of law”<sup>112</sup>, accountability for abuses is one of the *sine qua non* fundamentals of peace. Conversely, “peace cannot be achieved without accountability for human rights violations”<sup>113</sup>.

In light of this, one can assert that accountability for human rights violations stemming from corporate complicity is a major presumption for positive peace on the one hand, as it constitutes “the missing piece of the puzzle to pursue the full spectrum of justice and remedy for authoritarian and civil conflict periods”<sup>114</sup>. On the other hand, corporate accountability might play a major role in the process of fostering and sustaining peace in its negative dimension. Indeed, if one takes into account that business actors are likely to be present and conduct their activities in fragile areas even after a given conflict or period of internal instability has ended, accountability for corporate complicity in human rights abuses has the potential of discouraging corporate involvement in third parties’ abuses and preventing the emergence of tensions leading to renewed conflict<sup>115</sup>. Put differently, legal accountability of corporate actors has the deterrent effect of “effectively prevent future corporate complicity in human rights violations”<sup>116</sup>.

---

<sup>109</sup> Garcia-Godos (n 40) 322.

<sup>110</sup> Sriram, *Beyond Transitional Justice: Peace, Governance, and Rule of Law*, (2017) 56.

<sup>111</sup> Garcia-Godos (n 40) 322.

<sup>112</sup> *Ibid.*, 325.

<sup>113</sup> Van de Sandt & Moor (n 92) 17.

<sup>114</sup> Payne & Pereira (n 25) 65.

<sup>115</sup> Van de Sandt & Moor (n 92) 17.

<sup>116</sup> *Ibid.*; see also Butcher and Hallward (n 50) 83.

## 3.2. Complicity under International Law and its Applicability in the Context of Business and Human Rights

### 3.2.1. Complicity under International Criminal Law

‘Corporate complicity’ represents a developing area in the context of international law<sup>117</sup>, and, more specifically, in the context of international criminal law. As a result, very scarce settled law exists on this subject, yet, according to legal scholars, the notion itself has been “legitimized and incorporated into the fabric of international law”<sup>118</sup>. Historical cornerstones for the development of notions of criminal liability for corporate complicity in human rights violations are the trials brought before Nuremberg and UK tribunals after the end of World War II<sup>119</sup>. The codification of notions of corporate criminal responsibility, indeed, develops as a result of the number of instances involving industrialists and corporate officials directly assisting and contributing to the human rights violations and crimes perpetrated by the Nazi regime<sup>120</sup>. An example is the *The Zyklon B* Case trial, where three corporate officials were indicted for complicity in the commission of genocide through the supplying of the poison gas used in concentration camps<sup>121</sup>. The case law from Nuremberg and UK courts represents a major step forward in the process of establishing ‘complicity’ as a basis for criminal liability, since it is clarified, generally, how accomplices do not escape liability even if they execute or act under the direction of another actor and have knowledge that their acts contribute and/or facilitate the commission of a violation<sup>122</sup>.

In strictly legal terms, complicity in human rights abuses that amount to international crimes, that is, wrongful conduct that assists the abuses of a principal perpetrator, gives rise to criminal liability of actors under international criminal law. Notably, the Statutes of the major international criminal tribunals have included provisions which highlight the possibility of

<sup>117</sup> Khan (n 18) 1390.

<sup>118</sup> Payne & Pereira (n 25) 65.

<sup>119</sup> Olson, *Corporate Complicity in Human Rights Violations under International Criminal Law*, (2015) 3. See, *inter alia*, the *I.G. Farben Trial*, Trial of Carl Krauch and twenty-two others, United States Military Tribunal, Nuremberg, 14th August, 1947-29th July, 1948, Law Reports of Trials of War Criminals: twenty-three corporate officials of German MNC IG Farben were accused of complicity in crimes against peace, war crimes and crimes against humanity perpetrated by the Nazi Regime.

<sup>120</sup> Olson (n 119) 3.

<sup>121</sup> *The Zyklon B*, Case trial of Bruno Tesch and two others, British Military Court, Hamburg, 1st-8th of March 1946, Law Reports of Trials of War Criminals, Volume I.

<sup>122</sup> This has been stated, *inter alia*, in *United States v. Goering* (The Nuremberg Trial) 6 F.R.D 69 (Int’l Mil. Trib. 1946), p. 55-56.

accomplice or ‘secondary’ liability<sup>123</sup>. It is important to specify, however, that these instruments only provide for individual criminal liability, that is, courts can exercise jurisdiction on natural persons only, as opposed to legal persons<sup>124</sup>. As a result, economic entities like corporations are excluded from the jurisdiction *ratione personae* of international criminal courts, thus, cannot be held criminally accountable for complicity at the international level<sup>125</sup>. Nonetheless, individual criminal liability still applies and corporate officials are still subject to the jurisdiction of the courts and can be held criminally liable for complicity in their individual capacity – *i.e.* “for assisting other actors in violations of international law”<sup>126</sup>. For instance, in *Prosecutor v. Michel Bagaragaza*, the individual defendant was found guilty of complicity in the Rwandan Genocide by means of practical and logistical assistance offered to the paramilitary group chief perpetrator of the Tutsi massacres<sup>127</sup>.

International legal instruments clarify how individual accomplice liability generally arises in circumstances of ‘aiding and abetting’, shorthand for direct complicity. ‘Aiding and abetting’ possesses two elements of the crime, whose identification is necessary for the purpose of establishing secondary liability<sup>128</sup>: (a) the causation element, that is, “the necessary connection between the act of the accomplice and the act of the principal perpetrator”<sup>129</sup> – also referred to as *actus reus*; and (b) the mental element, or *mens rea* – *i.e.* the knowledge and intent of the accomplice in the commission of the crime<sup>130</sup>. These are analyzed in turn.

### 3.2.1.1. *Actus Reus of Aiding and Abetting*

The *actus reus* element of ‘aiding and abetting’ points to the conduct of an accomplice who “for the purpose of facilitating the commission of a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means of its

<sup>123</sup> See *Statute of the International Criminal Court* (ICC), Art 25(3)(c); see also *Statute of the International Criminal Tribunal for the Former Yugoslavia* (ICTY), Art 7(1), and *Statute of the International Criminal Tribunal for Rwanda* (ICTR), Art 6(1).

<sup>124</sup> ICC Statute, Art 25; ICTY Statute, Art 6; ICTR Statute, Art 5. See also Roberts (n 18) 193.

<sup>125</sup> Olson (n 119) 4.

<sup>126</sup> Roberts (n 18) 194.

<sup>127</sup> *Prosecutor v. Bagaragaza*, Sentencing Judgement, ICTR-05-86-S (ICTR TC III, Nov. 17, 2009).

<sup>128</sup> Discussed, *inter alia*, in Olson (n 119) 7. See also UN Human Rights Council, A/HRC/8/16, *Clarifying the Concepts of “Sphere of Influence” and “Complicity”*, paras. 34-44; Chiamenti, *Corporations and the International Criminal Court*, (2006) 309.

<sup>129</sup> Chiamenti (n 128) 309.

<sup>130</sup> *Ibid.*

commission”<sup>131</sup>. Case law from international criminal tribunals has clarified that the standard of the *actus reus* element of ‘aiding and abetting’ requires “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”<sup>132</sup>. This standard has also been applied in domestic judicial systems, *inter alia*, in the course of civil litigation under the Alien Tort Claims Act (ATCA) in the United States<sup>133</sup>.

In the context of business and human rights, corporate officials might be held liable under international law for ‘aiding and abetting’ the commission of abuses when it can be demonstrated that the individual holds the required *actus reus* of assisting the principal perpetrator in the commission of violations and does so “with the purpose of facilitating the commission of the crime”<sup>134</sup>. In other words, the accomplice shares the purpose of the principal perpetrator and his actions and/or omissions are expected to assist and facilitate the commission of abuses<sup>135</sup>. For complicity liability to arise, moreover, the assistance provided by the accomplice in the commission of a crime “need not cause, or be the necessary contribution to, the commission of the crime”<sup>136</sup>. In other words, it should be demonstrated that the violation on the part of the principal perpetrator would have occurred even without the assistance of a corporate actor<sup>137</sup>.

### 3.2.1.2. *Mens Rea of Aiding and Abetting*

The *mens rea* element of ‘aiding and abetting’ – that is, the accomplice’s mental state – requires that an individual accomplice has knowledge that its actions and/or omissions facilitate and/or contribute to the commission of the violation by the principal perpetrator<sup>138</sup>. Nonetheless, aiding and abetting does not require that the accomplice and principal perpetrator share the same *mens rea*, or that the individual accomplice does not want the violation to be

<sup>131</sup> See Statute of ICC, Art 25(3)(c).

<sup>132</sup> *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para. 235; *Prosecutor v. Dusko Tadic (Trial Judgement)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, para. 688. See also Clapham (n 19) 234; De Shutter, *Towards a New Treaty on Business and Human Rights*, (2015) 62, fn. 88.

<sup>133</sup> The standard has been applied, *inter alia*, in *John Doe v. Unocal Corp* 395 F 3d 932 (2002), 947-948.

<sup>134</sup> Clapham (n 19) 234.

<sup>135</sup> Clough (n 19) 907-908.

<sup>136</sup> UN Doc. A/HRC/8/16 (n 128), para. 37. See also Clapham (n 29) 10.

<sup>137</sup> *Blaskic* (ICTY Appeals Chamber), 29 July 2004, para. 48.

<sup>138</sup> Wettstein (n 79) 35. See also Olson (n 119) 8.

committed<sup>139</sup>. It is sufficient that the accomplice has knowledge of “the essential elements of the crime that was ultimately committed by the principal perpetrator”<sup>140</sup>.

In the context of corporate complicity in human rights abuses, establishing the *mens rea* of corporate actors is controversial. However, it has been noted that ‘aiding and abetting’ might require that a business actor has knowledge or ‘should have knowledge’ that its acts and/or omissions in the context of business operations carried out in vulnerable areas might contribute to the human rights abuses of other actors. Particularly, the ‘should have knowledge’ requirement would translate into the expectation that the company itself “could reasonably know under given circumstances”<sup>141</sup> that its acts/omissions might facilitate human rights violations. By way of example, in light of this stipulation, liability would arise for a corporate individual who is aware that the service its company is providing is going to be used by a state or non-state actor to carry out human rights abuses. In such a case, individuals would not escape liability by claiming that they were only carrying out ‘normal business operations’ with other actors, if they are aware that such operations would facilitate the commission of violations<sup>142</sup>. Finally, as anticipated, accomplice and principal perpetrator need not share the same *mens rea*. This means that a corporate official would still incur accomplice liability even if his or her actions were motivated by economic interests rather than by the commission itself of a violation, neither if he or she did not want the violation to be perpetrated<sup>143</sup>.

### 3.2.2. Categories of Corporate Complicity in Human Rights Violations<sup>144</sup>

Scholars suggest that it would be inaccurate to think “there is an independent meaning for complicity at the international level that one can simply strictly apply to determine whether corporate behavior is complicit in human rights abuses”<sup>145</sup>. Nonetheless, four different categories of corporate complicity are generally distinguished. At the institutional level, the *UNGC* recognizes the involvement of corporate actors in human rights abuses, especially in

<sup>139</sup> UN Doc. A/HRC/8/16 (n 128), para 42. See also Olson (n 119) 8.

<sup>140</sup> *Ibid.*

<sup>141</sup> Wettstein (n 79) 35.

<sup>142</sup> Olson (n 119) 9.

<sup>143</sup> Clough (n 19) 912. See also Chiomenti (n 128) 309.

<sup>144</sup> In this section and subsections ‘complicity’ is used in a semi-legal sense of the notion, merely pointing to the corporate position vis-à-vis its involvement in third parties’ violations. Indeed, some of the categories discussed point to forms of complicity which would not give rise to liability *per se*.

<sup>145</sup> Clapham (n 29) 25.

vulnerable areas, by way of direct and indirect complicity, which, in turn, can be further split into beneficial and silent complicity<sup>146</sup>. These will be analyzed in turn.

### 3.2.2.1. Direct Complicity

Direct complicity is the most common form of corporate involvement in human rights violations, carried out by a third party, be it a host government or a non-state actor. A company might assist violations because they are in its interest and under circumstances related to business operations<sup>147</sup>, in the form of a direct contribution to the abuses on the part of the principal perpetrator<sup>148</sup>. In the case of a corporate actor conducting business operations with a repressive host state, being in a joint venture with a country with an appalling human rights record has been demonstrated to be enough to establish direct corporate complicity under international law<sup>149</sup>. In such a case, it is common that there exists a strong business relationship between the host government and the TNC, which is oftentimes aware of the human rights abuses perpetrated, yet continues to cooperate with the government carrying out existing contractual obligations<sup>150</sup>.

Notably, direct complicity manifests, in line with the legal dimension of the notion, by way of ‘aiding and abetting’ the principal perpetrator in the commission of human rights violations<sup>151</sup>, which, as seen, is an established basis for individual liability under international law. By way of example, in *John Doe v. Unocal*, Burmese plaintiffs accused Oil Company *Unocal* of complicity by ‘aiding and abetting’ a number of human rights violations carried out by the government of Burma (now Myanmar) during the construction works of the Yadana pipeline<sup>152</sup>.

Equally important, an allegation of directly complicit in human rights violations might arise due to omissions rather than acts. As to this, it has been shown that “an omission or failure to

---

<sup>146</sup> Principle 2 of UN Global Compact with Commentary. For an analytical discussion on the four types of corporate complicity see, *inter alia*, Chesterman (n 73); Ingierd & Syse, *The Moral Responsibilities of Shareholders: A Conceptual Map*, (2011); Clapham & Gerbi, *Categories of Corporate Complicity in Human Rights Abuses*, (2001); Chiomenti (n 128); and Wettstein (n 79).

<sup>147</sup> Clough (n 19) 909.

<sup>148</sup> Wettstein (n 79) 36.

<sup>149</sup> Tofalo, *Over and Hidden Accomplices: Transnational Corporations’ Range of Complicity for Human Rights Violations*, (2006) 343.

<sup>150</sup> *Ibid.*, 340.

<sup>151</sup> For examples of acts amounting to ‘aiding and abetting’ in the context of business activities see Roberts (n 18) 197.

<sup>152</sup> *John Doe v. Unocal Corp* 395 F 3d 932 (2002). For another example see *Wiwa v. Royal Dutch Petroleum* 96 Civ. 8386 (KMW) (2002).

act may also amount to substantial assistance that constitutes aiding and abetting if the omission/failure to act has the decisive effect on the violation”<sup>153</sup>. It is important to clarify that only direct complicity – out of all ways in which corporate actors might engage in third actors’ violations – will give rise to liability of corporate actors. On the other hand, as further discussed later, corporate actors engaging in indirect complicity are less likely to incur legal liability under international law<sup>154</sup> – however, this type of complicity might still be relevant for the attribution of corporate responsibility in contexts of a non-legal nature, for instance non-judicial mechanisms adopted as part of transitional justice processes<sup>155</sup>.

### 3.2.2.2. *Indirect Complicity*

Indirect complicity lacks the agency relation between a state actor and a corporate actor that would commonly be encountered in circumstances of direct complicity<sup>156</sup>, and it has generally been defined as “otherwise lawful conduct that closely serves to aid a state actor in violating human rights, where there is knowledge of State human rights abuses, but no intertwined connection between the State and the TNC”<sup>157</sup>, that would be enough to demonstrate that the two actors are ‘partners’ in the jointly commission of human rights violations.

As mentioned, while conduct akin to direct complicity translates into a direct or ‘active’ contribution of a corporate actor in the commission of violations by another actor, indirect complicity translates into conduct that provides an indirect or ‘inactive’ contribution to human rights violations, in that it “supports, in a general way, the ability of the perpetrator to carry out systematic human rights violations”<sup>158</sup>. In other words, the scope of indirect complicity goes beyond “active assistance given to a primary perpetrator”<sup>159</sup>. Notably, within the realm of indirect complicity, beneficial and silent complicity can be further distinguished. These will be discussed in turn below.

<sup>153</sup> Roberts (n 18) 197. See also *Prosecutor v. Blaskic*, Case No.: IT-95-14 A.Ch., 3 March 2000, para. 284.

<sup>154</sup> UN Doc. A/HRC/8/16 (n 128), paras. 11-12.

<sup>155</sup> Further discussed in Part Four of the thesis.

<sup>156</sup> Tofalo (n 149) 345.

<sup>157</sup> *Ibid.*

<sup>158</sup> Wettstein (n 79) 36.

<sup>159</sup> Wettstein, *Silence as Complicity: Elements of a Corporate Duty to Speak Out against the Violation of Human Rights*, (2012) 40.

(a) *Beneficial Complicity*

A company operating in conflict-affected and high-risk areas might be accused of complicity when it benefits from the human rights abuses committed by third parties<sup>160</sup>. Instances of this form of complicity include violations committed by local security forces hired by TNCs to protect companies' interests and facilities – such as “suppression of peaceful demonstrations against business operations in the host country or the use of repressive measures to guard company facilities”<sup>161</sup>. By way of example, plaintiffs in *Kiobel v. Royal Dutch Petroleum* accused RDP's Nigerian subsidiary for having sought the help of the Nigerian Government in repressing protests and demonstrations against the environmental effects of the company's extractive practices in the country<sup>162</sup>. In other words, the fact that a TNC benefits from a given human right abuse perpetrated by a third party might be sufficient to invoke the responsibility, at least from a moral point of view, of the company itself – thus, the company need not necessarily contribute to the violation actively<sup>163</sup>.

From a legal point of view, on the other hand, the question whether liability might arise for instances of indirect complicity – including beneficial complicity – is particularly complex. As explained by scholars, while beneficial complicity might be sufficient to raise the question of a company's moral responsibility with regards to human rights, it seems difficult “to make a legal case for beneficial complicity if there is not also some actual or active contribution by the corporation to the violation of human rights”<sup>164</sup>. In other words, in the absence of corporate conduct which resembles to a greater extent direct complicity – aiding and abetting –, beneficial complicity is unlikely to give rise to the legal liability of corporate actors under international law<sup>165</sup>.

(b) *Silent Complicity*

Notably, in some cases, omissions may denote implicit acts of corporate complicity. More specifically, corporate complicity might arise when corporate actors fail to act in the face of widespread human rights violations carried out in host countries. In such cases, the company

<sup>160</sup> Discussed in, *inter alia*, Clapham & Gerbi (n 146); Wettstein (n 79); Tofalo (n 149); and Chiomenti (n 128).

<sup>161</sup> Clough (n 19) 910. See also Clapham & Gerbi (n 146) 347.

<sup>162</sup> *Kiobel v. Royal Dutch Petroleum CO.* 569 U.S. (2013), p. 2.

<sup>163</sup> Wettstein (n 79) 36.

<sup>164</sup> *Ibid.*

<sup>165</sup> Clough (n 19) 910.

might be regarded as a ‘silent accomplice’ who fails to denounce the abuses when it has knowledge or should have knowledge of it<sup>166</sup>, or fails to exercise leverage on the parties committing human rights violations, when in the position to do so<sup>167</sup>. Inaction in the face of human rights abuses taking place in host countries where TNCs operate might amount to complicity in at least two scenarios<sup>168</sup>. In a first case, silence might be interpreted as opposed to ‘neutrality’<sup>169</sup>, and it might give rise to corporate complicity when the company’s failure to act translates into a tacit approval of the violations<sup>170</sup> which, in turn, has “a potentially legitimizing and encouraging effect on a perpetrator”<sup>171</sup>. As a result, the TNC in a way “assists the human rights violations through its inaction”<sup>172</sup>. In a second scenario, a corporation might be accused of silent complicity when, in the face of abuses and under a legal duty to do something, it fails to act accordingly<sup>173</sup> – also referred to as direct negligence on the part of the company.

Advocates of silent complicity have noted that, even though the TNC is not directly involved in the violations, “the company may nonetheless be called upon to speak out or act when an oppressive government violates its citizens’ rights”<sup>174</sup>. Due to the difficulty in establishing when silence actually represents an instance of complicity on the part of a company, the *UNGC* has noted unsurprisingly how silent complicity is the “most controversial type of complicity”<sup>175</sup>, morally and legally speaking.

---

<sup>166</sup> De Shutter (n 132) 62.

<sup>167</sup> Wilson (n 60) 62.

<sup>168</sup> Wettstein (n 79) 37.

<sup>169</sup> Tofalo (n 149) 349.

<sup>170</sup> Wettstein (n 79) 37.

<sup>171</sup> Wettstein (n 159) 40. By way of example, Oil Company *Shell*, operating in Nigeria, was accused of silent complicity for having turned a blind eye on the execution of Saro-Wiwa and other human rights abuses committed in the midst of repression of peaceful protests against the company’s environmental practices in the country. More specifically, *Shell*’s silence in the face of the abuses, coupled with its substantial capacity to influence local actors, has been seen as an implicit approval of the violations perpetrated by the Nigerian government.

<sup>172</sup> Clough (n 19) 910.

<sup>173</sup> *Ibid.*

<sup>174</sup> Wettstein (n 79) 36.

<sup>175</sup> See Principle 2 of *UNGC* and Commentary.

### 3.3. Accountability for Corporate Complicity and its Significance for Peace: Critical Analysis of the International Justice System and Positive Prospects

As noted earlier, accountability for human rights violations, including corporate violations in the context of business activities carried out in fragile areas, is “an indispensable component of peace and eventual reconciliation”<sup>176</sup>, therefore, its role in peace promotion cannot be underestimated<sup>177</sup>. While this is true, one should nonetheless acknowledge that “an accountability gap exists”<sup>178</sup> with regards to holding corporate actors liable for human rights abuses committed in the course of business operations carried out in conflict-affected and high-risk areas. Holding corporations liable for abuses in these contexts is oftentimes not an easy task, both at the international and national level. In the former, issues arise with respect to the current system of liability under international criminal law and the jurisdictional limitations of that system with regards to corporate actors. In the latter, domestic jurisdictions of home and host countries of TNCs are “often unable or unwilling to hold corporations accountable”<sup>179</sup>. This scenario is traditionally worsened by the many hurdles, procedural and doctrinal, that victims of corporate human rights violations encounter during litigation<sup>180</sup>, which have led to the recognition of ‘corporate impunity’ as the recurrent pattern in international law.

It is, therefore, necessary to address the shortcomings of the current system entrusted with the task of holding corporate actors liable for their human rights violations – specifically those stemming from acts of complicity – and to analyze and assess how domestic law and recent developments under human rights law in the field of business and human rights might be relevant in terms of filling the existing legal gap. Overall, it is argued that, provided that holding corporate actors accountable for past human rights abuses is one of the *sine qua non* elements of the process of achieving sustainable peace<sup>181</sup> and, in turn, lack of accountability is a driver of conflict, addressing the existing legal gap is of utmost importance in order to foster peace in a more effective manner.

---

<sup>176</sup> Garcia-Godos (40) 322.

<sup>177</sup> Sriram (n 110) 56.

<sup>178</sup> SOMO Report, *Risks and Challenges around Human Rights and Conflict*, (2015) 5.

<sup>179</sup> *Ibid.*

<sup>180</sup> For a discussion on this see, among others: Apter, *Corporate Liability for Human Rights: Effective Remedies or Ineffective Placebos?*, (2016); Blumberg, *Asserting Human Rights Against Multinational Corporations under United States Law: Conceptual and Procedural Problems*, (2002).

<sup>181</sup> Van de Sandt & Moor (n 92) 17.

### 3.3.1. Limitations under International Criminal Law and Developments in National Law and International Human Rights Law

Corporate accountability for human rights violations is severely affected at the international level due to the limitations on the jurisdiction exercised by international criminal courts, which is confined to natural persons. Therefore, legal entities like corporations are excluded from their jurisdiction *ratione personae* and, as a result, cannot be held liable for complicity at the international level<sup>182</sup>. Nonetheless, individual criminal liability is still an option and individuals within the corporate structure can still be subject to the jurisdiction of criminal courts and be held liable for human rights violations in their individual capacity, including for acts of complicity – *i.e.* “for assisting other actors in violations of international law”<sup>183</sup>. One should specify that the failure to recognize the criminal liability of legal persons at the international level is merely a procedural flaw and does not translate whatsoever into a denial “of fundamental duties owed by private actors and their criminal responsibility in international law”<sup>184</sup>. While this is true, it is clear that the failure to recognize corporate criminal liability severely impairs the scope of corporate accountability, given that in the past only corporate individuals have faced accountability rather than companies as a whole<sup>185</sup>.

At the national level, individual criminal liability has also been resorted to in cases involving allegations of complicity brought in home countries of corporate actors that do not currently recognize corporate criminal liability. Examples include cases brought in domestic courts of Germany, Canada, and Colombia. In the first case, corporate officials of German-Swiss corporation *Danzer Group* operating in the Democratic Republic of Congo (DRC) were accused of complicity in the form of aiding and abetting – by means of acts and omissions – human rights violations perpetrated by local police and military forces in the country<sup>186</sup>. More specifically, they were accused of contributing to human rights violations directly and indirectly by way of “failing to prevent the abuses from being committed and supporting financially and logistically the country’s forces”<sup>187</sup>. In Canada, a case was brought before domestic courts

---

<sup>182</sup> Olson (n 119) 4.

<sup>183</sup> Roberts (n 18) 194.

<sup>184</sup> Koska (n 28) 42.

<sup>185</sup> Payne & Pereira (n 25) 69.

<sup>186</sup> Van de Sandt & Moor (n 92) 47. See also <https://www.business-humanrights.org/en/danzer-group-siforco-law-suits-re-dem-rep-congo>

<sup>187</sup> See: <https://www.business-humanrights.org/en/danzer-group-siforco-lawsuits-re-dem-rep-congo>

against *Argor-Heraus SA* for complicity in the form of active involvement through financial support in the human rights abuses – including rapes and murders – carried out by the local authorities during an armed conflict in the Democratic Republic of Congo<sup>188</sup>. Finally, the Colombian *Urapalma* case is particularly relevant as it constitutes the “first criminal conviction in the country of businessmen for their role in the forced displacement of communities by paramilitary forces during armed conflicts”<sup>189</sup>.

Even though individual criminal liability might be functional to some extent, failure to recognize corporate criminal liability still poses a big restraint on corporate accountability<sup>190</sup>. Therefore, tackling the jurisdictional shortcomings of the international justice system is particularly significant in terms of filling the existing legal gap when it comes to the responsibility of private actors and securing a higher degree of corporate accountability which, in turn, is argued to be a driver of peace, by way of delivering justice to victims of corporate abuses and serving as a deterrent for future involvement in human rights wrongdoings. Legal practices in domestic jurisdictions and recent developments in international human rights law need to be taken into account as they might represent a valuable starting point for addressing the current gap on legal accountability of corporate actors.

Foremost, in the context of domestic judicial systems, the criminal liability of legal persons is beginning to be recognized by a number of developed countries<sup>191</sup>. Alternatively, where countries do not recognize corporate criminal liability domestically, civil corporate liability has been resorted to as a means to hold corporations accountable for complicity in human rights abuses. More specifically, civil liability of corporate actors has been generally pursued in the form of transnational litigation, recalling that accountability is hard to obtain in conflict-affected and high-risk host countries due to “weak governance structures and lack of capacity and knowledge”<sup>192</sup>. Relevant examples of the use of civil litigation when dealing with allegations of corporate complicity appear in the context of US judicial system, where a number

---

<sup>188</sup> Van de Sandt & Moor (n 92) 48.

<sup>189</sup> Payne & Pereira (n 25) 73.

<sup>190</sup> *Ibid.*, 69.

<sup>191</sup> Roberts (n 18) 209. See also Ramasastry and Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, Fafo Report, (2006) 13.

<sup>192</sup> Van de Sandt & Moor (n 92) 17.

of lawsuits have been brought under the ATCA<sup>193</sup>, a Statute which has been historically used by foreign victims of corporate human rights violations committed abroad to seek adequate justice and remedy. The case law of domestic courts employing the ATCA particularly confirms that legal entities might be held liable for human rights violations committed in foreign countries and “can be held liable under the Statute for their complicity in violations of international law”<sup>194</sup>. As for accountability for direct complicity specifically, it has been noted that involvement in the wrongdoings of other actors in the form of aiding and abetting may directly render a corporation liable<sup>195</sup>. While an analysis of the outcome of cases brought under the ATCA is beyond the scope of the present thesis, it is important to notice that the domestic recognition of corporate liability for complicity in human rights abuses certainly represents a big step forward in the process of holding legal entities accountable for human rights violations, at least when corporations directly aid and abet third actors’ abuses.

In the context of international human rights law, recent developments offer promising prospects that might strengthen accountability of corporate entities complicit in human rights abuses. In this sense, a core breakthrough might come from the recent *UN Draft Treaty on Business and Human Rights*, or ‘Zero Draft’, released during the summer of 2018. Briefly, the call for the adoption of a binding instrument on business and human rights was endorsed at the UN level in Resolution 26/9<sup>196</sup> which established an ‘open-ended intergovernmental working group’ with the task of drafting a binding treaty on business and human rights that would, *inter alia*, strengthen states’ duties to undertake effective legislative and administrative measures to deal with legal accountability of corporations responsible for human rights violations<sup>197</sup>. Albeit its embryonic stage, an analysis of the draft is relevant as it provides significant responses with regards to legal accountability of corporate actors, including domestic criminal liability, and its domestic implementation might assist countries in the process of holding private entities

---

<sup>193</sup> The Statute (28 U.S.C. § 1350; ATS) is part of the United States Code and reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.

<sup>194</sup> Roberts (n 18) 210.

<sup>195</sup> See, *inter alia*, Forcese, *ATCA’s Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, (2001), 497; Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act*, (2006), 43; Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, (2002), 130.

<sup>196</sup> UN Resolution A/HRC/RES/26/9. 14 July 2014.

<sup>197</sup> UN Doc. A/HRC/34/47. 4 January 2017, para. 37.

accountable for human rights violations – especially countries which do not recognize corporate criminal liability domestically and do not have the benefit of a civil liability statute like the ATCA<sup>198</sup>.

With regards to the limitations on criminal accountability posed by the international justice system, the majority of reports of the working sessions published before and after the release of the Zero Draft highlight the importance for an internationally binding instrument on business and human rights to include provisions on criminal liability that would “correct a historical failure by making legal persons liable, as was expected for article 25 of the Rome Statute, and by attributing criminal responsibility to corporations”<sup>199</sup>. The inclusion of corporate criminal liability – relevant in terms of the scope of the present thesis – would be a significant step towards accountability for corporate complicity in human rights abuses which amount to crimes under international law and, at the same time, it would “serve as a deterrent”, additionally strengthening respect for the rights of individuals and communities adversely affected by corporate conduct, particularly in vulnerable areas<sup>200</sup>.

Specifically, Article 10 of the Zero Draft deals with legal liability, civil and criminal, of corporate actors involved in human rights violations. *Inter alia*, the provision is of key relevance for the present analysis for at least two reasons.

First, with regards to criminal liability, Article 10(8) provides that corporate actors shall be held accountable when they “intentionally, whether directly or through intermediaries, commit human rights violations that amount to internationally recognized crimes under international law, international human rights law, and domestic legislation”<sup>201</sup>. Most importantly, the provision clarifies the scope of corporate complicity – ‘secondary’ or accomplice liability – and it highlights how “criminal liability for human rights violations [...] shall apply to principals, accomplices and accessories”<sup>202</sup>. In other words, corporate criminal liability shall arise in circumstances where corporate actors operating in particularly vulnerable contexts contribute

<sup>198</sup> Ramasastry and Thompson (n 191) 152.

<sup>199</sup> UN Doc. A/HRC/34/47. 4 January 2017, para. 85; see also UN Doc. A/HRC/31/50. 5 February 2016, para. 96.

<sup>200</sup> UN Doc. A/HRC/37/67. 24 January 2018, para. 84.

<sup>201</sup> UN Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises or “Zero Draft”*, 16 July 2018. Art. 10(8).

<sup>202</sup> *Ibid.*

to and/or facilitate the human rights abuses of third actors such as states and armed groups – *i.e.* for aiding and abetting others’ human rights violations.

Second, Article 10 is extremely relevant in widening the scope of corporate accountability, as it envisages liability of legal entities domestically, thus, promising to correct the historical jurisdictional limitations posed at the international level by the instruments<sup>203</sup> of the major criminal courts, which contemplate individual criminal liability only. In this respect, Article 10(10) provides that states parties to the future treaty “ensure that legal persons are subject to criminal liability”<sup>204</sup>. The recognition of criminal liability of legal persons certainly is expected to provide for a greater and more effective degree of corporate accountability, proposing to put an end to impunity of those corporate actors asserting that, in virtue of their nature of legal persons, they are not bound by international criminal and human rights law<sup>205</sup>.

Altogether, by virtue of the initiatives of domestic jurisdictions which begin to recognize corporate criminal liability or adopt civil liability alternatively and the recent developments under human rights law in the context of business and human rights, it appears clear that, even though legal barriers hindering corporate accountability will not be eliminated overnight, the recognition of liability of legal entities certainly represents a potential major and functional step forward in the process of securing corporate accountability for human rights violations, including those stemming from corporate complicity. More specifically, one might expect that recognizing criminal liability of legal persons will serve the ultimate purpose of strengthening criminal justice mechanisms which, as noted, “are essential to tackle the past”<sup>206</sup>.

In view of the purpose of the present thesis, the discussion on the existing accountability gap for corporate human rights violations and the analysis of the potential ways to tackle the legal shortcomings at the international level are particularly significant in terms of their impact on the two dimensions of peace, as anticipated. On the one hand, accountability of legal entities complicit in human rights violations and justice for victims of corporate-related abuses are constitutive elements of the process of bringing about positive peace in societies experiencing periods of internal violence, abuses and instability, by way of strengthening respect for human

<sup>203</sup> ICC Statute, Art 25; ICTY Statute, Art 6; ICTR Statute, Art 5.

<sup>204</sup> “Zero Draft” (n 200) Art. 10(10).

<sup>205</sup> Payne & Pereira (n 26) 69.

<sup>206</sup> Message by UN High Commissioner for Human Rights, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24490&LangID=E>

rights and boosting the rule of law. On the other hand, accountability delivered through criminal prosecution of corporations as a whole, rather than individuals only, is judged to have “lasting deterrent effects both within the state and throughout a corporation’s global activities”<sup>207</sup> – including on corporate complicity – by way of making “corporations who operate in close contact with perpetrators of human rights abuses think very carefully about their role in the wrongdoings”<sup>208</sup>. In this respect, legal accountability would potentially promote negative peace by serving as a disincentive on corporate involvement in abuses which are likely to further instability. At the end of the day, as recognized at the UN level, “experience has demonstrated that without justice, peace remains an illusion. Therefore, asserting accountability and countering impunity are preconditions to sustainable peace”<sup>209</sup>.

---

<sup>207</sup> Van Ho, *Transnational Civil and Criminal Litigation*, (2013), 57. See also Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, (2001), 473.

<sup>208</sup> Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, (2005) 16.

<sup>209</sup> UN High Commissioner for Human Rights (n 205).

## PART FOUR

### 4 Corporate Accountability in the Context of Transitional Justice and Post-Conflict Promotion of Peace

The fourth macro section of the present thesis aims to link the field of corporate accountability, especially for human rights violations stemming from complicity, to the field of transitional justice (TJ). The assumption is made that taking into account violations linked to conduct of corporate actors in the context of TJ mechanisms is ultimately relevant to achieve a core goal of TJ, namely peace, by way of delivering justice and accountability. An additional and equally significant assumption points to the potential role that analyzing corporate complicity through the lenses of non-judicial mechanisms adopted as part of TJ processes might play in delivering accountability. Particularly, accountability for typologies of corporate complicity which are unlikely to give rise to legal liability *per se* of corporate actors. In this regard, the thesis will hereafter employ ‘complicity’ in line with a broader understanding of corporate accountability, so that the following discussion will not be confined to the strictly legal connotation of the notion. Accordingly, it will be easier to consider and analyze how some forms of complicity are dealt with in TJ non-judicial mechanisms, where corporate actors might still be called upon and face responsibility, albeit of a non-legal nature, for their involvement in human rights abuses.

It is important to specify that, while Part Three of the present thesis has focused on accountability for instances of complicity in vulnerable areas as defined in Section 1.4.1. – therefore areas experiencing armed violence and human rights violations, but not necessarily conflict –, the present section focuses on the issue of corporate accountability for complicity in the specific and separate context of states transitioning from periods of conflict and authoritarian rule, through the lenses of transitional justice mechanisms.

Scholars who have previously explored the link between corporate accountability and TJ have acknowledged how the issues resulting from corporate conduct in conflict-affected and high-risk areas “are usually not conceptualized as part of TJ and, in turn, TJ rarely finds its way into the academic discussion of corporate accountability and/or complicity”<sup>210</sup>. The existing

---

<sup>210</sup>Michalowski, *Introduction*, (2013), 1.

literature contends that discussing corporate accountability in light of TJ and *vice versa* can potentially enhance both fields, since they share the ultimate goal of preventing renewed conflict and human rights abuses, through the achievement of justice<sup>211</sup>. The present section, however, aims to expand on this claim by exploring it through the prism of peace. Specifically, one might argue that, while preventing recurrence of violence and human rights violations leading to conflict and seeking justice for corporate human rights violations, both fields ultimately promote important underlying conditions which facilitate achievement of positive and negative peace. Therefore, it appears significant to conceptualize corporate accountability for human rights violations, especially those stemming from acts of complicity, in the context of TJ mechanisms in light of peace promotion efforts in post-conflict societies.

The following sections will: (1) provide a conceptualization of transitional justice; (2) analyze the significance of corporate accountability in transitional justice mechanisms in terms of peace and; (3) assess how taking into account complicity in non-judicial mechanisms of transitional justice processes might strengthen corporate accountability for types of complicity-related abuses unlikely to give rise to legal liability *per se* of corporate actors.

#### **4.1. Conceptualizing Transitional Justice (TJ)**

In international law, the field of TJ has gradually been developed as a result of “the demands and differing circumstances of many transitional states around the world, and the increased expectation that accountability is due after atrocities”<sup>212</sup>. In a nutshell, TJ is expected to provide means to “reckon with and address massive past crimes and abuses”<sup>213</sup>.

At the institutional level, TJ has been defined as encompassing of “both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programs, institutional reform or an appropriate combination thereof [...] aimed at tackling the root causes of conflicts and the related violations of all rights, including civil, political, economic, social and cultural rights”<sup>214</sup>. Ultimately, TJ is expected to facilitate the achievement of “broader objectives of prevention of further conflict, peacebuilding and reconciliation”<sup>215</sup>.

---

<sup>211</sup> Michalowski (n 210) 1.

<sup>212</sup> Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, (2011), 8.

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

<sup>214</sup> UN Guidance Note of the Secretary-General, *United Nations Approach to Transitional Justice*, (2010), 3. See also Sriram (n 110) 54.

<sup>215</sup> UN Guidance Note (n 214) 3. See also Hayner (n 212) 8.

Similarly, scholarly literature has conceptualized TJ as a tool allowing societies transitioning from periods of conflict or repressive rule to deal with their past, in terms of “attempting to see justice done in relations to past suffering and harm”<sup>216</sup>. In other words, TJ mechanisms address human rights violations perpetrated in the context of conflicts and/or periods of oppression, in order to create the conditions necessary for peace and reconciliation in the form of accountability for past wrongdoings<sup>217</sup>.

Specifically, accountability – one of the objectives of TJ – is expected to be delivered in four specific forms by way of different mechanisms, which scholars have distinguished as follows<sup>218</sup>: (1) retributive justice, which focuses on prosecution and criminal liability of actors involved in the perpetration of abuses; (2) truth-seeking processes, which aim to uncover the truth and acknowledge past violations; (3) prospective justice, that is expected to provide accountability through the promotion of institutional reforms aimed at deterring renewed violations and; (4) restorative justice, which mainly focuses on the victims of past human rights violations and/or crimes.

For the purpose of the present discussion, it is important to specify that the analysis of the relationship between TJ, accountability and peace will depart from the traditional state-centered understanding of transitional justice; instead, it will be undertaken with a focus on the role of private actors like corporate entities involved in third parties’ abuses. As to this aspect, TJ processes have traditionally “focused on the behavior of states and their direct associates in the perpetration of human rights violations”<sup>219</sup>. Nonetheless, both theoretical and empirical studies demonstrate that other actors in the international field, like TNCs, have growingly become object of scrutiny in the context of TJ processes, in light of their direct and indirect involvement in human rights abuses when operating in vulnerable areas. In theory, it has been noted that both the scholarly and institutional conceptualization of TJ does not support a presumption against including corporate actors as object of TJ, inasmuch as they play a role in furthering violence and abuses at times of conflict, through their involvement in states and non-

---

<sup>216</sup> Garcia-Godos (n 40) 321.

<sup>217</sup> Sooka, *Dealing with the Past and Transitional Justice: Building Peace through Accountability*, (2006), 313. See also Koska (n 28) 41; Payne & Pereira, *Accountability for Corporate Complicity in Human Rights Violations: Argentina’s Transitional Justice Innovation?*, (2015) 30.

<sup>218</sup> See, *inter alia*, Garcia-Godos (n 40) 321.

<sup>219</sup> Payne & Pereira (n 217) 30.

state actors' abuses and as long as "corporate accountability advances the goals of TJ as a whole"<sup>220</sup>. As to this latter point, the thesis has previously shed light on the significance of corporate accountability in terms of furthering peace and reconciliation, therefore, its inclusion in TJ processes would contribute to serve the overall purposes of TJ *per se*. At the empirical level, as well, corporate actors have several times been object of scrutiny in TJ contexts, both in judicial and non-judicial mechanisms.

#### **4.2. Why Linking Corporate Accountability to Transitional Justice is Relevant in Terms of Peace Promotion**

The thesis contends that including accountability of corporate actors for their involvement in past human rights violations in the context of transitional justice processes might be significant in terms of peace for a number of reasons. Foremost, recalling that human rights abuses linked to corporate conduct are likely to generate violence leading to conflict, addressing the root causes of conflict itself in the form of accountability for primary perpetrators and potential accomplices can serve as a major premise to restore peace in post- conflict societies. Therefore, since TJ processes are established to accomplish this specific aim, incorporating accountability of actors other than states might contribute to strengthen the ultimate goals of transitional justice *per se – inter alia*, restoration of the rule of law, faith in governance and mitigation of the risks of return to conflict<sup>221</sup>. As such, scholars have convened that the success of transitional justice *per se* might eventually depend on the inclusion of "corporate accountability as the missing piece of these processes"<sup>222</sup>.

Within the realm of accountability, more importantly, corporate complicity in particular should become a focus of transitional justice mechanisms. However, this claim requires the following observation. At first sight, not every type of complicity might allegedly fall within the scope of transitional justice processes, whose traditional focus has been accountability for involvement in abuses amounting to "illegal behavior"<sup>223</sup>. An analysis of the modalities of complicity discussed earlier in the thesis is therefore necessary. With respect to direct complicity, it is easy to establish that direct or 'active' contribution and/or involvement in third

---

<sup>220</sup> Payne & Pereira (n 217) 30.

<sup>221</sup> Sriram (n 110) 57.

<sup>222</sup> Payne & Pereira (n 217) 38.

<sup>223</sup> *Ibid.*, 31.

actors' abuses amounting to crimes under international and domestic law would fall within the scope of TJ. On the other hand, when it comes to indirect or 'inactive' contribution to human rights abuses, – such as beneficial or silent complicity – establishing the legality *per se* of corporate conduct which is clearly morally wrong and, thus, the extent to which such conduct would fall within the scope of transitional justice is controversial. Nonetheless, it can be argued that, inasmuch as corporations engage in either immoral or illegal conduct which contributes to the perpetration of abuses, “they should face accountability and thus fall within the remit of transitional justice<sup>224</sup>. Therefore, complicity would fall within the scope of transitional justice not because of the characterization of corporate conduct, rather on the basis of the transitional justice goal of securing accountability for wrongdoings.

As anticipated, including corporate complicity in transitional justice might implicitly promote negative and positive peace. As to this, two preliminary observations, *inter alia*, should be made. First, one should note that stressing corporate accountability for complicity translates into a direct acknowledgement of “business involvement in systematic and widespread violations” carried out by states and/or non-state actors at times of conflict<sup>225</sup>. Second, accountability for corporate complicity highlights the post-conflict urgency of raising the legal and/or moral responsibility of corporate actors who have taken part in conflict-related human rights abuses.

These two observations lay the foundations for the analysis of how taking into account corporate complicity in TJ mechanisms can promote both dimensions of peace. Acknowledging the active or inactive involvement of business actors in past human rights abuses on the one hand and raising the question of their legal and/or moral responsibility on the other hand might directly increase the reputational and/or financial costs of corporate actors likely to conduct their activities in vulnerable areas even after a given conflict has ended<sup>226</sup>. In terms of negative peace, this would potentially have a deterrent effect in preventing future human rights violations stemming from corporate complicity, which might most likely exacerbate and sustain future conflict<sup>227</sup>. Put differently, such deterrent would presumably mitigate, albeit not eliminate, the

---

<sup>224</sup> Payne & Pereira (n 217) 31.

<sup>225</sup> *Ibid.*, 30.

<sup>226</sup> *Ibid.*, 31.

<sup>227</sup> *Ibid.*

risk of renewed violence, thereby, intrinsically promoting negative peace to a certain extent. On the other hand, the link between accountability for corporate complicity in TJ processes and positive peace is more straightforward. In this sense, accountability for human rights violations perpetrated at times of conflict or oppressive rule, and in which corporate actors are complicit, would facilitate the achievement of the full spectrum of justice for victims of abuses, implicitly promoting post-conflict reconciliation.

Overall, the potential effect of including corporate complicity in transitional justice processes in terms of negative and positive peace cannot be overlooked. By taking into account responsibility for corporate complicity, transitional justice would tackle one of the root causes of conflict and violence by deterring future abuses and strengthening justice for victims, while sending a strong message to corporate actors “about the reputational, financial, and legal risks of becoming partners with authoritarian regimes and armed violent actors”<sup>228</sup>.

### **4.3. The Role of Non-Judicial Mechanisms in Delivering Corporate Accountability and Fostering Peace: A Focus on Truth Commissions**

Among the mechanisms that transitional justice has available to deal with past abuses, non-judicial mechanisms – specifically truth commissions (TCs) or commissions of inquiry – have become legitimate means to deliver accountability of actors involved in past human rights violations, including corporate actors<sup>229</sup>. As such, they have growingly been resorted to by governments of transitioning states as a response to abuses carried out at times of conflict and as a tool from which “other measures for accountability, reparations, and reforms may be developed”<sup>230</sup>. The stress on how relevant truth-telling is after a period of widespread violations is directly dependent on the recognition that individuals are entitled to an inalienable right to truth. At the institutional level in particular, it has been noted how “every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes”<sup>231</sup>.

---

<sup>228</sup> Payne & Pereira (n 217) 40.

<sup>229</sup> Koska (n 28) 42.

<sup>230</sup> Hayner (n 212) 20.

<sup>231</sup> UN ECOSOC, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1. Principle 2. See also ECOSOC, *Study on the Right to Truth*, UN Doc. E/CN.4/2006/91.

Scholars have convened that it is difficult to provide “a single, broadly accepted definition of what constitutes a truth commission”<sup>232</sup>, nonetheless, at minimum, for a body to be defined as such, it has to meet a number of requirements. These encompass, *inter alia*, a focus on past violations committed at times of armed conflict or abusive rule, and a primary aim of investigating perpetrators and describing “causes and consequences of the violations committed in the sponsoring states”<sup>233</sup>. As part of processes aimed at bringing about reconciliation and peace, TCs share the ultimate goals of transitional justice as a whole and they are generally entrusted with “formally acknowledging the truth about past abuses, countering impunity, and most importantly advancing accountability for perpetrators”<sup>234</sup>. In terms of accountability for corporate abuses, the expectation that official knowledge about violations associated to unethical and/or illegal corporate conduct helps “hold business actors accountable for remedy and repair of those past harms”<sup>235</sup> is substantial. Therefore, it is generally recognized that truth commissions are likely to deliver a certain degree of accountability, serving as a platform, albeit of a non-judicial nature, for calling out actors involved in abuses and raising the question of their responsibility.

With regards to corporate complicity, more specifically, the role played by corporate actors in states and non-state actors’ abuses has been highlighted by TCs established, *inter alia*, in East Timor and Liberia. In the former case, the Timor-Lester Commission for Reception, Truth and Reconciliation (CAVR), established in 2001, acknowledged the role of business actors in human rights violations carried out during the country’s internal conflict of 1975. Specifically, the Commission recognized the involvement of corporations in supporting the human rights abuses perpetrated by the Indonesian government, as well as their indirect involvement in benefitting and profiting from the conflict<sup>236</sup>. In the latter case, the final report of the Truth and Reconciliation Commission (TRC) of Liberia, established in 2003, highlighted the role of corporations that “seized upon the chaos and strife”<sup>237</sup> of the country’s fourteen-years long civil

---

<sup>232</sup> Hayner (n 212) 20.

<sup>233</sup> *Ibid.*, 11.

<sup>234</sup> *Ibid.*, 20.

<sup>235</sup> Payne & Pereira (n 217) 31.

<sup>236</sup> Center for International Law and Policy (CILP), *Briefing Report: Transitional Justice & Corporate Accountability*, (2016) 4-5.

<sup>237</sup> *Ibid.*, 7.

war, including by way of providing logistical support, such as the sale of weapons, to state-actors perpetrating abuses, “with the result of prolonging violence and instability”<sup>238</sup>.

Notably, non-judicial mechanisms such as truth commissions might deliver a different form of accountability than the one provided by strictly judicial mechanisms such as trials. With regards to accountability for corporate actors involved in human rights abuses, while trials might to a limited extent deliver justice in the form of guilty verdicts, the truth-telling part of transitional justice processes “delivers corporate accountability in the form of reputational costs”<sup>239</sup> which are likely to send out a strong message about the risks of taking part in the violations of third actors at times of conflict or authoritarian rule. As a result, the role that TCs play vis-à-vis judicial mechanisms is widely recognized. However, it would be imprecise to consider non-judicial mechanisms an ‘alternative’ to judicial ones – that is an alternative to justice in the form of criminal prosecution<sup>240</sup>. Rather, TCs play a complementary role to criminal justice. In this sense, the positive contribution provided by truth commissions with regards to criminal accountability is supported by evidence showing how non-judicial platforms might help advance criminal accountability “by providing to prosecutors the names of suspects and clear evidence on which to build a case”<sup>241</sup>.

In the quest to secure accountability for corporate human rights violations, resorting to truth-seeking might be significant under two analytical considerations. The former looks at states’ obligations under human rights law and the complementary nature of TCs vis-à-vis trials with respect to delivering corporate accountability. The latter examines the subject matter of truth-seeking and, more specifically, the significance of resorting to TCs when dealing with forms of corporate complicity in third actors’ violations that are unlikely to give rise to legal liability of corporate actors *per se*. These two will be analyzed hereafter.

Under human rights law, states bear tripartite human rights obligations, that translate into protecting, respecting, and fulfilling individual rights. Specifically, states’ duty to protect entails a requirement to prevent human rights violations by third parties. As part of such duty, whenever human rights violations are committed, states are required, *inter alia*, to prosecute or

---

<sup>238</sup> Center for International Law and Policy (CILP), *Briefing Report: Transitional Justice & Corporate Accountability*, (2016) 7.

<sup>239</sup> Payne & Pereira (n 217) 44.

<sup>240</sup> Hayner (n 212) 92.

<sup>241</sup> *Ibid.*

extradite perpetrators. Defining the extent of such requirement – encapsulated in the Latin maxim *aut dedere aut judicare* – is nonetheless controversial, as many scholars have expressed doubts as to the alleged customary nature of the obligation itself<sup>242</sup>. As a response, international and regional instruments have envisaged an alternative way for states to fulfil their obligation to protect human rights, which entails “to conduct an effective investigation capable of leading to a prosecution”<sup>243</sup>.

In the specific context of business and human rights, this is elaborated in the *UNGPs*, which clarify how states must take appropriate steps “to prevent, investigate, punish and redress”<sup>244</sup> human rights violations linked to corporate activities. However, along with the essential task of carrying out impartial and independent investigations on corporate human rights violations, states are still required to ensure that perpetrators are held legally liable and ultimately provide victims with adequate access to justice, which, *inter alia*, entails working towards the reduction, if not removal, of the major legal, practical and procedural barriers hindering corporate accountability<sup>245</sup>. In fact, the state duty to ensure victims’ adequate access to legal remedies and justice does not always translate into corporate accountability *per se*, due to the number of aforementioned barriers and, oftentimes, the unwillingness and/or lack of capacity of states to enforce human rights standards against corporate actors.

As a response to this, the analysis of the role of non-judicial truth-seeking becomes relevant in light of two observations. First, as noted, trials oftentimes do not lead to corporate accountability as the majority of cases brought before courts – either international/domestic and criminal/civil – “remain ongoing or under appeal, dismissed or settled before reaching a final judgement on the condition of no admission of wrongdoing”<sup>246</sup>. Therefore, a different type of corporate accountability – different from the strictly legal one that is expected to be secured through access to judicial remedies – might be provided in the context of transitional justice non-judicial mechanisms like truth commissions. In this sense, corporate accountability and effective remedies for victims might be provided in the course of investigations of wrongdoings

<sup>242</sup> Koska (n 28) 44. See also UN Doc. A/Res/60/147, *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*, (2006).

<sup>243</sup> Koska (n 28) 44.

<sup>244</sup> *UNGPs*, UN Doc. A/HRC/17/31, Principle 1 and Commentary.

<sup>245</sup> *Ibid.*, Principle 26 and Commentary. See also Koska (n 28) 44.

<sup>246</sup> Payne & Pereira (n 25) 71.

involving corporate actors and in the form of reputational costs for companies. Additionally, in light of states' obligations envisaged in international instruments on business and human rights, the use of truth commissions might help states fulfill their duty to investigate corporate human rights violations, as accordingly enshrined in the *UNGPs* for instance<sup>247</sup>.

The second reason why the employment of truth commissions might be relevant with regards to strengthening corporate accountability and, therefore, indirectly contribute to advance positive peace in post-conflict scenarios, is directly linked to their potential in dealing with corporate responsibility for instances of complicity. Within the realm of corporate complicity, one specific type of indirect or 'inactive' contribution to human rights violations will be the major focus of the analysis that follows – *i.e.* beneficial complicity. As described earlier, beneficial complicity points to circumstances where a company indirectly benefits from the human rights abuses of a third party<sup>248</sup>. The question whether this type of complicity might give rise to legal accountability of corporate actors *per se* remains controversial. Notably, while beneficial complicity might be sufficient to raise the question of a company's moral responsibility with regards to human rights, it seems difficult "to make a legal case for beneficial complicity if there is not also some actual contribution by the corporation to the violation of human rights"<sup>249</sup>.

Given that establishing accountability, in its legal sense, for corporate conduct which is not akin to direct complicity is a difficult task, truth commissions might be better suited to deal with the issue of moral responsibility for corporate indirect involvement in abuses. As noted at the UN level, indeed, "benefiting is a relevant consideration in non-judicial contexts"<sup>250</sup> and this might well be applied in the context of truth commissions. By way of example, in 1998, the South African Truth and Reconciliation Commission, a pioneer in addressing corporate involvement in human rights abuses, distinguished three modalities of corporate 'complicity' in human rights violations committed during the apartheid era<sup>251</sup>: (1) direct involvement in "designing and implementing apartheid"; (2) profiting from the sale of services and activities that promoted abuses; and (3) indirectly benefiting "by operating in apartheid society". More specifically, the

---

<sup>247</sup> Koska (n 28) 44.

<sup>248</sup> *Inter alia*, see De Shutter, (n 132); Wettstein, (n 79); Tofalo, (n 149); Chiomenti, (n 128).

<sup>249</sup> Wettstein (n 79) 36.

<sup>250</sup> UN Human Rights Council, A/HRC/8/16 (n 128), para. 41.

<sup>251</sup> *Ibid.*, para. 41 with related footnotes.

Commission recognized how “apartheid was beneficial for (white) business because it was an integral part of a system premised on the exploitation of black workers and the destruction of black entrepreneurial activity”<sup>252</sup>.

With regards to corporate accountability, the Commission noted how (1) and (2) above – defined as first and second order involvement in abuses – must give rise to the legal responsibility and accountability of actors involved for the suffering caused, *inter alia*, by the implementation of oppressive policies or practices, or the provision of services and products used for morally unacceptable purposes<sup>253</sup>. On the other hand, indirectly benefiting from human rights abuses – third order corporate involvement, as referred to in the Report – “is clearly of a different moral order” vis-à-vis directly and knowingly taking part in corporate conduct which has the goal of contributing and/or facilitating state violations<sup>254</sup>. While benefiting is unlikely to translate into legal responsibility of companies involved, the Commission ultimately clarified that companies are still morally responsible for their inactive involvement and doing business “requires a conscious commitment to realistic moral behavior grounded in a culture of international human rights law”<sup>255</sup>. Therefore, while a generalization of the conclusions drawn by the Commission would be inaccurate, the example shows that, even though it might not give rise to legal accountability of corporations, indirect involvement by way of benefitting from third actors’ abuses should still be of concern of corporate actors, as it represents a crucial factor in establishing their moral accountability through non-judicial mechanisms adopted as part of TJ processes. In fact, as highlighted by the Commissions, corporate actors should growingly recognize that “morality is an important ingredient of viable business”<sup>256</sup>.

Overall, non-judicial mechanisms employed in the context of transitional justice processes notably might serve a double purpose. First, one might contend that the establishment of truth commissions might help strengthen states’ duty to ensure corporate accountability through effective and independent investigations, given that, as noted, legal liability of corporate actors is oftentimes difficult to secure in judicial contexts. Moreover, TCs might

---

<sup>252</sup> Final Report of the South African Truth and Reconciliation Commission, Volume 4, Chapter 2, para. 6.  
Available at: <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>

<sup>253</sup> *Ibid.*, paras. 23, 27, and 28.

<sup>254</sup> *Ibid.*, para. 23.

<sup>255</sup> *Ibid.*, paras. 147 and 148.

<sup>256</sup> *Ibid.*, para. 147.

deliver corporate accountability in the form of reputational costs, providing at least partial remedy to victims of corporate violations. Second, pursuing truth-seeking in TJ appears to be relevant vis-à-vis the forms of corporate complicity dealt with – *i.e.* the subject-matter of truth commissions – and the question of corporate accountability itself. With respect to this, one can ultimately assert that non-judicial contexts such as truth commissions are relevant to the question of establishing corporate responsibility from a moral perspective, especially for instances of complicity that do not involve a direct contribution by a company to the human rights violations *per se*. The contribution provided by TCs in this sense is particularly crucial since indirect complicity is unlikely to give rise to legal accountability of corporate actors.

In terms of post-conflict reconciliation and peace promotion, the analysis has sought to show how truth commissions, non-judicial bodies among other mechanisms of TJ, might ultimately be instrumental to advancing underlying goals of peace in its positive dimension, namely justice and accountability for corporate human rights violations by way of “allowing for broader concepts of corporate responsibility than those available in the legal realm”<sup>257</sup>. Therefore, an investigation of their role and impact becomes relevant and the adoption of these mechanisms should be taken into account in post-conflict contexts dealing with past abuses and seeking to promote the necessary conditions of peace.

---

<sup>257</sup> Michalowski & Carranza, *Conclusion*, (2013), 254.

## PART FIVE

### 5 Concluding Remarks

Corporate actors have been under increasing scrutiny by the international community for the adverse impacts caused by way of involvement in the human rights abuses of third actors when conducting business in vulnerable areas with poor governance structures and weak legal systems. At the same time, impunity of corporate actors involved in abuses has been the recurrent pattern. Against this background, the notion of corporate complicity has increasingly been resorted to by lawyers and advocates of business and human rights movements to portray the corporate position vis-à-vis the human rights abuses of third actors and to seek a greater degree of corporate accountability for violations of human rights standards. In the context of international criminal law, the notion of complicity has been codified to determine individual responsibility for involvement in violations of international law; additionally, case law from international criminal tribunals and domestic courts has contributed to develop the legal content and constitutive elements of complicity.

As explained, complicity in human rights abuses by corporate actors has proved to be a major force behind generation and/or escalation of conflicts by way of exacerbation of the conditions leading to violence. Addressing ways to tackle corporate complicity and ensure effective corporate accountability for complicity, therefore, appears significant in terms of prevention of renewed violence and promotion of reconciliation and peace for countries transitioning from periods of conflict or authoritarian rule. In light of this, the present thesis has argued that human rights practices adopted by corporate actors operating in fragile contexts – where instances of complicity are more likely – and accountability for corporate-related human rights violations are extremely relevant tools to the process of promoting peace in its negative and positive dimensions. As noted, these two point to absence of violence and conflict, on the one hand, and justice and accountability for abuses, *inter alia*, on the other.

The present thesis has sought to explore, from the perspective of international law, the business, human rights and peace discourse and, in order to answer the main research question, it has analyzed the role of corporate human rights practices aimed at preventing complicity and accountability for corporate human rights violations stemming for complicity on the promotion of peace. Accordingly, the following considerations can be drawn:

- (a) First, corporate human rights practices might play a role in lowering the likelihood of violence leading to conflict, therefore, fostering peace in vulnerable areas. Among these, particularly crucial are corporate due diligence requirements envisaged in institutional soft law regulatory initiatives, as they play a substantial role in the prevention of human rights abuses by way of corporate involvement in third actors' violations.
- (b) Second, accountability for human rights violations is one of the constitutive elements of peace in its positively defined dimension. Nonetheless, there exist a legal gap at the international level when attempting to hold corporate actors liable for their involvement in third actors' abuses. Such gap is particularly evident as a result of the number of procedural, jurisdictional and doctrinal shortcomings plaguing the international justice system. Among these, the jurisdictional limitations under international criminal law hinder effective accountability of corporate actors. In response to this, the research has addressed meaningful ways to tackle these shortcomings in the contexts of domestic law and international human rights law.
- (c) Third, corporate accountability for complicity in human rights abuses should be included in transitional justice processes established in countries transitioning from conflict or authoritarian rule, as it has been demonstrated that its inclusion might contribute to further reconciliation and peace in post-conflict societies. In the specific context of corporate complicity, non-judicial mechanisms like Truth Commissions are potentially suited to raise the question of responsibility of corporate actors involved in human rights abuses outside the common paradigm of international law – therefore, they represent a relevant tool to deliver accountability, of a moral nature, of businesses.

In sum, it has been shown how practices observed by corporate actors under human rights law and effective accountability for complicity delivered in judicial and non-judicial contexts can significantly contribute to advancing negative peace by way of deterring and lowering the likeliness of renewed violence and conflict stemming from human rights violations, and positive peace by way of securing more effectively justice for victims of corporate complicity. Overall, the research hereby undertaken is an attempt to show how interdependent business, human rights and peace can be and how these issues come together and interact in the context

of international law. At the same time, further and more empirical-based research should be conducted in this field, particularly in light of the ongoing legal developments at the national and international level in the context of business and human rights.

## **Table of References**

### **Hard and Soft Law Documents/Instruments**

Alien Tort Statute, (28 U.S.C. § 1350; ATS)

International Labor Organization. ‘Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy’, 204<sup>th</sup> Sess., (16 November 1977), amended in 2000.

Organization for Economic Cooperation and Development (OECD). ‘OECD Guidelines for Multinational Enterprises’, (27 June 2000).

UN Economic and Social Council. ‘Code of Conduct on Transnational Corporations’, UN Doc. E/1987/INF/5 (10 June 1987).

UN Economic and Social Council, ‘Report of the Independent Expert to Update the Set of Principles to Combat Impunity’, UN Doc. E/CN.4/2005/Add.1 (8 February 2005).

UN Economic and Social Council, ‘Study on the Right to the Truth’, UN Doc. E/CN.4/2006/91 (8 February 2006).

UN Global Compact and PRI, ‘Guidance on responsible business in conflict-affected and high-risk areas: a resource for companies and investors’ (2010).

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’ UN Doc. A/RES/60/147 (21 March 2006).

UN General Assembly, ‘Rome Statute of the International Criminal Court (last amended 2010)’ (17 July 1998).

UN General Assembly, ‘Universal Declaration of Human Rights’ 217 A (III) (10 December 1948).

UN General Assembly, ‘Declaration on the Right to Peace: resolution / adopted by the General Assembly’ A/RES/71/189 (2 February 2017).

UN Guidance Note of the Secretary-General, ‘United Nations Approach to Transitional Justice’, (2010).

UN Human Rights Council. ‘Clarifying the Concepts of “Sphere of influence” and “Complicity”’: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie’, UN Doc. A/HRC/8/16 (15 May 2008).

UN Human Rights Council. ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, UN Doc. A/HRC/17/31 (21 March 2011).

UN Human Rights Council. ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ UN Doc. A/HRC/26/9 (14 July 2014).

UN Human Rights Council, ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises or “Zero Draft”’, (16 July 2018).

UN Human Rights Council, ‘Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument’ UN Doc. A/HRC/31/50 (5 February 2016).

UN Human Rights Council, ‘Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument’ UN Doc. A/HRC/34/47 (4 January 2017).

UN Human Rights Council, ‘Report on the third sessions of the open-ended intergovernmental working groups on transnational corporations and other business enterprises with respect to human rights’ UN Doc. A/HRC/37/67 (24 January 2018).

UN Security Council, ‘Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)’ (25 May 1993).

UN Security Council, ‘Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)’ (8 November 1994).

## Reports

- Centre for Research on Multinational Corporations (SOMO). (2015). *Multinational Corporations in Conflict-Affected Areas: Risks and Challenges around Human Rights and Conflict*.
- Forrer J, Fort T and Gilpin R. (2012). *How Business can Foster Peace*. United States Institute of Peace (USIP).
- International Commission of Jurists. (2008). *Corporate Complicity and Legal Accountability*. Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes.
- International Dialogue on Peacebuilding & Statebuilding. *International Standards for Responsible Business in Conflict-Affected and Fragile Environments*.
- Athie, A & Mahmoud, Y. (2017). *Human Rights and Sustaining Peace*. International Peace Institute (IPI).
- Killick N. (2005). *The Role of Local Business in Peacebuilding*. Berghof Research Center for Constructive Conflict Management.
- Peace Research Institute of Oslo (PRIO). (2018). *Business and Peacebuilding: Seven Ways to Maximize Positive Impact*. PRIO.
- Ramasastri, A & Thompson, R. (2006). *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*. Fafo Report 536.
- Van de Sandt, J & Moor, M. (2017). *Peace, Everybody’s Business: Corporate Accountability in Transitional Justice: Lessons for Colombia*. PAX.
- Van Dorp M. (2014). *Multinationals and Conflict: International Principles and Guidelines for Corporate Responsibility in Conflict-Affected Areas*. Centre for Research on Multinational Corporations (SOMO).

## Academic Articles, Books and Book Chapters

- Andreassen B and Vinh K. (2016). "Business' Duties across Borders: The Human Rights Frontier" in *Duties across Borders: Advancing Human Rights in Transactional Business*, edited by Andreassen and Vinh. Intersentia.
- Apter I. (2016). "Corporate Liability for Human Rights: Effective Remedies or Ineffective Placebos?" in *Duties across Borders: Advancing Human Rights in Transactional Business*, edited by Andreassen and Vinh. Intersentia.
- Austin, J & WennMann, A. (2017). *Business Engagement in Violence Prevention and Peace-Building: the Case of Kenya*. Conflict, Security & Development, Vol. 17, No. 6, pp. 451-472.
- Blumberg P. (2002). *Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems*. The American Journal of Comparative Law, Vol. 50, pp. 493-529. Oxford University Press.
- Bailliet C & Larsen K. (2015). "Introduction" in *Promoting Peace through International Law*, edited by Cecilia M. Bailliet & Kjetil Mujezinovic Larsen. Oxford University Press.
- Bailliet C. (2019). "Introduction: Researching International Law and Peace" in *Research Handbook in International Law and Peace*, edited by Cecilia M. Bailliet. Edward Elgar Publishing, Inc.
- Butcher C and Hallward M. (2017). *Bridging the Gap between Human Rights and Peace: An Analysis of NGOs and the United Nations Human Rights Council*. International Studies Perspectives, Vol. 18, pp. 81-109. Oxford University Press.
- Chambers, R. (2005). *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*. Human Rights Brief 13, No. 1, pp. 14-16.
- Chesterman S. (2011). "Laws, Standards or Voluntary Guidelines?" in *Human Rights, Corporate Complicity and Disinvestment*, edited by Gro Nystuen, Andreas Føllesdal and Ola Mestad. Cambridge University Press.
- Chiomenti C. (2006). "Corporations and the International Criminal Court" in *Transnational Corporations and Human Rights*, edited by De Shutter. Hart Publishing.

- Clapham, A & Jerbi, S. (2001). *Categories of Corporate Complicity in Human Rights Abuses*. Hastings Int'l & Comp. L. Rev. Vol. 24, pp. 339-349.
- Clapham A. (2011). "Corporations and Criminal Complicity" in *Human Rights, Corporate Complicity and Disinvestment*, edited by Gro Nystuen, Andreas Føllesdal and Ola Mestad. Cambridge University Press.
- Clapham, A. (2002). "On Complicity" in M. Henzelin & R. Roth (eds.) *Le droit pénal à l'épreuve de l'internationalisation*.
- Clough J. (2008). *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*. Brook Journal of International Law. Vol No. 33:3.
- Davis, R. (2012). *The UN Guiding Principles on Business and Human Rights and Conflict-Affected Areas: State Obligations and Business Responsibilities*. International Review of the Red Cross, Vol. 94, No. 887, pp. 961-979.
- De Shutter O. (2015). *Towards a New Treaty on Business and Human Rights*. Business and Human Rights Journal, 1, pp. 41-67. Cambridge University Press.
- Deva S. (2012). *Regulating Corporate Human Rights Violations: Humanizing Business*. Routledge.
- Donohue, C. (2015). *Multinational Corporations and Human Rights Law: Problems and Proposals for Reform*. NZACL Yearbook.
- D'Aspremont, J. (2011). "Non-state Actors in International Law: Oscillating between Concepts and Dynamics" in *Participants in the International Legal System: Multiple Perspectives on Non-state Actors in International Law*, edited by Jean d'Aspremont. Routledge.
- Engdahl, O. (2015). "Protection of Human Rights and the Maintenance of International Peace and Security: Necessary Precondition of Clash of Interests?" in *Promoting Peace Through International Law*, edited by Cecilia M. Bailliet & Kjetil Mujezinovic Larsen. Oxford University Press.
- Farah, Y. (2013). "Toward a Multi-Directional Approach to Corporate Accountability" in *Corporate Accountability in the Context of Transitional Justice*, edited by Michalowski. Routledge.
- Forcese, C. (2001). *ATCA's Achilles Heel: Corporate Complicity, International Law and the*

- Alien Tort Claims Act*. Yale Journal of International Law. Vol. 26, No. 1, pp. 487-515.
- Ford J. (2015). *Regulating Business for Peace: The United Nations, The Private Sector, and Post-Conflict Recovery*. Cambridge University Press.
- Galtung J. (1969). *Violence, Peace, and Peace Research*. Journal of Peace Research, Vol. 6, No. 3, pp. 169-191. SAGE Publications.
- Garcia-Godos J. (2015). "It's About Trust: Transitional Justice and Accountability in the Search for Peace" in *Promoting Peace through International Law*, edited by Cecilia M. Bailliet & Kjetil Mujezinovic Larsen. Oxford University Press.
- Hayner, P. (2011). *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. Routledge.
- Hiller J and Hiller S. (2014). "A Co-opetition Approach to Business, Human Rights Organizations and Due Diligence" in *Law, Business and Human Rights: Bridging the Gap*, edited by Robert Bird, Daniel Cahoy and Jamie Prekert. Edward Elgar Publishing.
- Ingierd H and Syse H. (2011). "The Moral Responsibilities of Shareholders: A Conceptual Map" in *Human Rights, Corporate Complicity and Disinvestment*, edited by Gro Nystuen, Andreas Føllesdal and Ola Mestad. Cambridge University Press.
- Karavias, M. (2014). *Corporate Obligations under International Law*. Oxford University Press.
- Khan I. (2007). "Understanding Corporate Complicity: Extending the Notion beyond Existing Laws" in *International Human Rights in Context*, edited by Henry Steiner, Philip Alston and Ryan Goodman. Oxford University Press.
- Koska G. (2016). *Corporate Accountability in Times of Transition: the Role of Restorative Justice in the South African Truth and Reconciliation Commission*. Restorative Justice: An International Journal, Vol. 4, No. 1, pp. 41-67.
- Leisinger K. (2007). "On Corporate Responsibility for Human Rights" in *International Human Rights in Context*, edited by Henry Steiner, Philip Alston and Ryan Goodman. Oxford University Press.
- Maassarani T. (2006). *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act*. International Law and Politics. Vol. 38, pp. 39-65.

- Martin-Ortega O. (2008). *Business and Human Rights in Conflict*. Ethics & International Affairs, Vol. 22:273-283.
- Melin M. (2016). *Business, Peace, and World Politics: The Role of Third Parties in Conflict Resolution*. Kelly School of Business, Indiana University.
- McCorquodale R, Smit L, Neely S and Brooks R. (2017). *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*. Business and Human Rights Journal, 2, pp. 195-224. Cambridge University Press.
- Michalowski, S. (2013). "Due Diligence and Complicity: a Relationship in Need of Clarification" in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, edited by Surya Deva and David Bilchitz. Cambridge University Press.
- Michalowski, S. (2013). "Introduction" in *Corporate Accountability in the Context of Transitional Justice*, edited by Michalowski. Routledge.
- Michalowski, S & Carranza, R. (2013). "Conclusion" in *Corporate Accountability in the Context of Transitional Justice*, edited by Michalowski. Routledge.
- Morgera, E. (2009). *Corporate Accountability in International Environmental Law*. Oxford University Press.
- Oetzel J. (2010). *Business and Peace: Sketching the Terrain*. Journal of Business Ethics, 89:351-373. Springer.
- Olson, D. (2015). *Corporate Complicity in Human Rights Violations under International Criminal Law*. International Human Rights Law Journal, Vol. 1, No. 1, pp. 1-13.
- Payne L & Pereira G. (2016). *Corporate Complicity in International Human Rights Violations*. Annu. Rev. Law Soc. Sci. 12:63-84.
- Payne L & Pereira G. (2015). "Accountability for Corporate Complicity in Human Rights Violations: Argentina's Transitional Justice Innovation?" in *The Economic Accomplices to the Argentine Dictatorship: Outstanding Debts*, edited by Horacio Verbitsky and Juan Pablo Bohoslavsky. Cambridge University Press.
- Papaioannou A. (2006). "The Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: A Case Study on Corporate Complicity in Human Rights Abuses" in *Transnational Corporations and Human Rights*, edited by De Shutter. Hart

Publishing.

- Pentikäinen, M. (2012). *Changing International 'Subjectivity' and Rights and Obligations under International Law – Status of Corporations*. *Utrecht Law Review*, Vol. 8, No. 1, pp. 145-154.
- Ralph, N. (2015). *Peacemaking and the Extractive Industries*. Routledge.
- Ramaswamy, A. (2002). *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, No. 1, pp. 91-159.
- Ratner S. (2001). *Corporations and Human Rights: A Theory of Legal Responsibility*. *Yale Law Journal*, Vol. 111, No. 3.
- Reiter, B. (2017). *Theory and Methodology of Exploratory Social Science Research*. Government and International Affairs Faculty Publications. University of South Florida.
- Rettberg A. (2016). *Need, Creed, and Greed: Understanding Why Business Leaders Focus on Issues of Peace*. Kelley School of Business, Indiana University.
- Richardson P. (2004). *Corporate Crime in a Globalized Economy: an Examination of the Corporate Legal Conundrum and Positive Prospects for Peace*. *Journal of Public and International Affairs*, Vol. 15. Trustees of Princeton University.
- Roberts K. (2013). “Corporate Liability and Complicity in International Crimes” in *Sustainable Development, International Criminal Justice, and Treaty Implementation*, edited by Sébastien Jodoin. Cambridge University Press.
- Ruggie J. (2013). *Just Business. Multinational Corporations and Human Rights*. W. W. Norton & Company, Inc. New York.
- Sjafjell B. (2017). *Dismantling the Legal Myth of Shareholder Primacy: The Corporation as a Sustainable Market Actor*. University of Oslo Faculty of Law, Legal Studies Research Paper Series No. 2017-03.
- Sooka Y. (2006). *Dealing with the Past and Transitional Justice: Building Peace through Accountability*. *International Review of the Red Cross*, Vol. 88, No. 862, pp. 311- 325.
- Sriram C. (2017). *Beyond Transitional Justice: Peace, Governance, and Rule of Law*. *International Studies Review*, Vol. 19, pp. 53-69

- Taka M. (2016). “A Critical Analysis of Human Rights Due Diligence Frameworks for Conflict Minerals: Challenges for the Electronics Industries” in *Duties Across Borders: Advancing Human Rights in Transactional Business*, edited by Andreassen and Vinh. Intersentia.
- Tofalo I. (2006). “Overt and Hidden Accomplices: Transnational Corporations’ Range of Complicity for Human Rights Violations” in *Transnational Corporations and Human Rights*, edited by De Shutter. Hart Publishing.
- Van Ho, T. (2013). “Transnational Civil and Criminal Litigation” in *Corporate Accountability in the Context of Transitional Justice*, edited by Michalowski. Routledge.
- Wettstein F. (2012). *Silence as Complicity: Elements of a Corporate Duty to Speak Out against the Violation of Human Rights*. *Business Ethics Quarterly*, 22:1, pp. 37-61.
- Wettstein F. (2010). *The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*. *Journal of Business Ethics*, Vol. 96, No. , pp. 33-47.
- Wilson J. (2006). “Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act” in *Transnational Corporations and Human Rights*, edited by De Shutter. Hart Publishing.
- Zyberi G. (2015). “The Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest” in *Promoting Peace through International Law*, edited by Bailliet & Larsen. Oxford University Press.

## Case Law

*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, International Court of Justice (ICJ), 5 February 1970

*Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998

*Prosecutor v. Blaskic (Trial Judgement)*, IT-95-14 A.Ch., 29, International Criminal Tribunal for the Former Yugoslavia (ICTY), 3 March 2000

*Prosecutor v. Tadic (Trial Judgement)*, IT-94-1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 7 May 1997

*Prosecutor v. Michel Bagaragaza (Trial Judgement)*, ICTR-05-86-S, International Criminal Tribunal for Rwanda (ICTR), 17 November 2009

*United States v. Goering* (The Nuremberg Trial) 6 F.R.D 69 (Int'l Mil. Trib. 1946)

*The Zyklon B*, Case trial of Bruno Tesch and two others, British Military Court, Hamburg, 1st-8th of March 1946, Law Reports of Trials of War Criminals, *selected and prepared by the United Nations War Crimes Commission*, Volume I

*The I.G. Farben Trial*, Trial of Carl Krauch and twenty-two others, United States Military Tribunal, Nuremberg, 14th August, 1947-29th July, 1948, Law Reports of Trials of War Criminals, *selected and prepared by the United Nations War Crimes Commission*, Volume X

*John Doe v. Unocal Corporation*, 395 F.3d 932 (2002)

*Kiobel v. Royal Dutch Petroleum Co.* 569 U.S. 108 (2013)

*Wiwa v. Royal Dutch Petroleum* 96 Civ. 8386 (KMW) (2002)

*Presbyterian Church of Sudan v. Talisman Energy*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006)

## **Online Sources**

Lawsuit against Danzer Group available at:

<https://www.business-humanrights.org/en/danzer-group-siforco-lawsuits-re-dem-rep-congo>

Speech by UN Secretary-General Antonio Guterres, available at:

<https://www.un.org/sg/en/content/sg/speeches/2018-04-24/peacebuilding-and-sustaining-peace-remarks-general-assembly>

Speech by UN High Commissioner for Human Rights Michelle Bachelet, available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24490&LangID=E>