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Implementing the third pillar: lessons from transitional justice guidance by the Working Group

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*

Summary

The report analyses the implications of implementing the four pillars of transitional justice (truth, justice, reparation and guarantees of non-recurrence), and of transitional justice mechanisms for the field of business and human rights. It unpacks how Pillar III of the UN Guiding Principles on Business and Human Rights (UNGPs) should be operationalised in transitional states, and it provides guidance on the role of relevant stakeholders in these contexts, including States, businesses, and civil society.

In relation to the rights of victims to seek, obtain and enforce remedies that are capable of collectively redressing the harm the rights holder suffered in the context of complex post-conflict and transitional justice settings, the report analyses the interlinkages between substantive and procedural components of providing an effective remedy in conformity with Pillar III of the UNGPs. It provides insights on how States have used transitional justice mechanisms to address business's responsibility for their role in conflict-affected areas, highlighting lessons learned and possible way forward.

As remedies in the context of transitional justice processes aim to provide reparation for victims according to international law and human rights standards, the first part of the report explains the relevant concepts and standards of reparation. This is followed by an overview of some of the most emblematic experiences in which transitional justice processes have addressed violations by businesses and an analysis of the lessons that can be drawn for the business and human rights context. Finally, the report contains specific recommendations for States and businesses on how to implement Pillar III of the UNGPs effectively in post conflict and transitional justice settings.

* Reproduced as received.

I. Introduction

1. In the aftermath of mass violence in periods of armed conflict or repression, States often use transitional justice mechanisms to provide remedies to victims, ensure accountability for perpetrators, and address the structural and root causes of the conflict. Transitional justice, as outlined by the United Nations Secretary-General, "is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[1] Particularly where transitional justice processes take place after protracted periods of armed conflict, they are often set up in contexts of fragile or destroyed institutions, drained resources, serious security problems, and highly polarised societies.

2. This guidance document aims to provide both an analysis of these experiences and specific recommendations for States and businesses on the implementation of Pillar III of the United Nations Guiding Principles on Business and Human Rights (UNGPs) in post-conflict and transitional justice scenarios. In particular, this guidance examines how the concepts of accountability and remedy set forth in Pillar III can be applied in the context of transitional justice. While Pillar III of the UNGPs sets forth guidance on access to remedy for States and businesses in general, it does not examine how access to remedy may be provided in the context of conflict and post-conflict settings. This report is a companion to the United Nations (UN) Working Group on Business and Human Rights 2020 Report to the UN General Assembly, Business, Human rights and Conflict-affected Regions: Towards Heightened Action.[2]

3. In implementing the four pillars of transitional justice (truth, justice, reparation and guarantees of non-recurrence),[3] the main transitional justice mechanisms are truth commissions, criminal prosecutions, reparations programmes and guarantees of non-recurrence. The latter include structural, economic, and political reforms and vetting aimed at ensuring the past does not happen again.

4. There is no singular approach to transitional justice because finding the best balance of pursuing accountability, regulatory reform and reparations programmes is context specific. Yet, the experiences with transitional justice can be informative for the field of business and human rights in conflict-affected settings. As the Working Group explained in its report to the UN General Assembly, in situations of transitional justice, "businesses have a responsibility to remedy their past behaviour" and "should engage with relevant transitional justice processes and contribute to truth, reparation and guarantees of non-recurrence where appropriate".[4] How this should occur, and how Pillar III of the UN Guiding Principles should be operationalised in transitional States, is sometimes unclear for States, businesses, and civil society. This report is a step to try and clarify the relationship between Pillar III and transitional justice frameworks.

5. The right to an adequate and effective remedy is both an independent human right and a central part of all other rights.[5] An effective remedy entails both procedural and substantive components. Substantive remedies, which will be referred to as "reparations" in this guidance note, are those measures aimed at redressing the consequences of a violation or abuse.[6] As the Working Group has previously recognised, rights holders are entitled "to seek, obtain and

[1] Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

[2] A/75/212.

[3] More recently, a fifth pillar of memorialisation has been added, see A/HRC/45/45. This guidance note will address memorialisation as part of satisfaction under the reparation pillar of transitional justice.

[4] A75/212, para. 85.

[5] See, UN Declaration on Human Rights at Article 8; International Covenant on Civil and Political Rights, art 2(3); International Convention on the Elimination of Racial Discrimination, art 6; Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, art. 14.

[6] The report refers to "violations" when a State is responsible for breaches of international human rights and/or humanitarian law. When non-State actors, such as businesses, are responsible for the harm, the report refers to "abuses", consistent with the UN Guiding Principles on Business and Human Rights.

enforce a bouquet of remedies: a range of remedies depending upon varied circumstances" that are capable of collectively redressing the harm the rights holder suffered.[7] Procedurally, individuals are entitled to a fair mechanism capable of independently reviewing their claims when they believe their rights have been violated. As the UNGPs recognise, the process can be State-based, non-State based, judicial, or non-judicial in nature.[8] The UNGPs also provide eight factors (legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue) that should be taken into consideration when assessing the effectiveness of non-judicial grievance mechanisms for providing a remedy.[9]

6. How to conceptualise and operationalise the interlinked substantive and procedural components of providing an effective remedy in the context of Pillar III of the UNGPs is particularly complex in post-conflict and transitional justice settings. It is here that transitional justice theory and practice can provide some valuable insights, as several States have used transitional justice mechanisms to address businesses' responsibility for their role in conflict and repression-related abuses. These experiences, and the lessons learned, are important for those who are designing remedies both in and outside of conflict-affected areas.

7. As remedies in the context of transitional justice processes aim to provide victims of gross human rights abuses reparation according to international law and human rights standards, the first part of this document will explain the relevant concepts and standards of reparation. This is followed by an overview of some of the most emblematic experiences in which transitional justice processes have addressed abuses by businesses and an analysis of the lessons that can be drawn from that for application in the business and human rights context when addressing the right to an effective remedy under Pillar III.

II. The legal standards for reparations

8. The obligation to provide reparation is a natural consequence and an "indispensable complement" of the breach of a legal responsibility.[10] Implementation of the right to an effective remedy requires consideration and harmonisation of the obligations that derive from international law (including international human rights, humanitarian and environmental law) and domestic law (such as liability of individuals and legal entities for civil damages). While international law normally places the burden for providing remedies on States, the UNGPs clarify that when a business has caused or contributed to a harm, it, too, has a responsibility to secure remedies for victims. In Principle 22, the UNGPs indicate that businesses should provide and participate in appropriate remedies when they cause or contribute to harms. Whether a business causes or contributes to a harm is determined by its own actions or omissions,[11] and when evaluating where on the continuum of responsibility a business falls, it is necessary to consider the business's own power and independence as well as the severity and predictability of the harm, and efforts taken by the business to mitigate the impact including through robust human rights due diligence.[12]

9. Under international law, the right of and the duty to provide reparation exists whenever an actor fails to fulfil its responsibilities, even if there is no clear mechanism for

[7] A/72/162, para. 38.

[8] A/HRC/17/31, Pillar III.

[9] A/HRC/17/31, Principle 31 and accompanying commentary.

[10] *See, Case Concerning the* Factory *at Chorzów* (Jurisdiction), International Court of Justice, Judgment of 26 July 1927 at para. 21.

[11] OHCHR, Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector 4 (12 June 2017), https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

[12] Tara Van Ho, "Defining the Relationships: 'Cause, Contribute, and Directly Linked To' in the UN Guiding Principles on Business and Human Rights" (2021) 43 Human Rights Quarterly 625, at 647-654. See also Office of the High Commissioner for Human Rights, (OHCHR), The Corporate Responsibility to Respect Human rights: An Interpretive Guide (2012), http://www.ohchr.org/Documents/ Issues/Business/RtRInterpretativeGuide.pdf.

enforcement.[13] Injured parties are entitled to reparation only when another actor has breached the standard of conduct expected by them in a particular situation. As such, the provision of reparation is predicated on an acknowledgement of wrongdoing.

10. An adequate and effective remedy is supposed to restore the victim to the position they would have enjoyed but for the offending conduct. As such, restitution – the restoring of that which was taken via the breach – is the preferred form of reparation under international law. This legal expectation, first articulated in inter-State disputes, has been recognised as a central component of international human rights law generally and transitional justice specifically.[14]

11. Unfortunately, full restitution is often impossible in the wake of gross violations of international human rights law or serious violations of international humanitarian law. States cannot restore a life that has been taken, years lost to arbitrary detention or a community that has been destroyed through forced relocation. Also, restitution without more might often mean placing the victim in a situation of inequality and disempowerment they were in to begin with and that might have been part of the root causes of the conflict.

12. In these circumstances, victim-centred reparations processes and programmes should be aimed at providing justice for the victim along with an appropriate constellation of reparative measures meant to mitigate the damage done and "the legacies of the violations".[15] This can sometimes include the need for transformative reparations that structurally improve the victim's situation.[16] UN treaty bodies and special procedure mandate holders, as well as regional courts, have recognised a variety of substantive measures that can be used as reparations. These include restitution, satisfaction, rehabilitation, guarantees of non-recurrence, justice and compensation.

13. In international human rights law, "satisfaction" refers to the formal acknowledgement of wrongdoing. This acknowledgement can occur through a court judgment, a process of truth and reconciliation, formal apologies, acknowledgements in the media, memorialisation, and/or participation in culturally appropriate or culturally sensitive ceremonies. It should also include "measures aimed at the cessation" of the violation or abuse.[17]

14. Victims are also entitled to the mental, physical, legal, economic and social rehabilitation necessary to reintegrate them into society and address the harm caused. This rehabilitation includes, for example, the provision of medical and psychological care as well as social services.[18] It can also include rehabilitation of the victim's civic status, e.g., to restore the good name of victims by making public declarations of their innocence, expunging criminal records and restoring documents.

15. "Guarantees of non-repetition", sometimes called "guarantees of non-recurrence", refers to changes in policy and practice needed to ensure that the violation or abuse don't happen again in the future. Generally, these measures are aimed at the underlying structural causes of violations and abuses and institutional reform. They can include injunctions against future activities, changes to official training or responsible personnel, legislative and judicial reforms, vetting, human rights education and dialogue, and the creation of monitoring and early alert mechanisms.[19]

16. Justice in transitional justice contexts is now widely understood and affirmed as inclusive of gender justice. International norms have evolved to be more inclusive of gender violence as a weapon of conflict and repression, to recognise gender inequality and discriminatory norms as contributors to gendered violence during conflict, to prioritise a

[13] *Case Concerning the Factory at Chorzów* (Jurisdiction), International Court of Justice, Judgment of 26 July 1927, at para. 21.

[14] A/69/518, at paras. 14-18.

[15] Ibid., at para. 8.

[16] Rodrigo Uprimny Yepes, 'Transformative reparations of massive gross human rights violations: between corrective and distributive justice', 27 *Netherlands Quarterly of Human Rights* 625 (2009).

[17] A/RES/60/47 at para 22.

[18] Ibid., at para.21.

[19] A/HRC/30/42.

gendered understanding of harms and remedies and to promote structural and normative changes to ensure non-recurrence of sexual and gender-based violence after conflict.[20]

17. A key element of repair to communities and business cultures involves addressing underpinning causes of gender violence and inequality for women and sexual minorities. When attending to the reparative needs of these groups, consideration should be given to institutional reforms and educational initiatives that can act as a guarantee of non-recurrence by addressing discriminatory behaviour from State actors, businesses, and members of society.

18. "Justice" as reparation refers to the right of victims for the States to carry out with due diligence their responsibility to investigate and where appropriate, prosecute and punish criminal acts[21] that lead to the violation or abuse of human rights. These investigations, prosecutions and punishments can act as a guarantee of non-recurrence by having a deterrent effect and by creating a record of wrongdoing and influencing the social standards for acceptable behaviour. More broadly, that acknowledgement of wrongdoing can be helpful in reintegrating the victims into society by signalling to society as a whole that what happened to them was not their own fault but was the responsibility of the perpetrators who breached human rights.

19. Victims are entitled to a fair and appropriate process capable of leading to the prosecution and punishment of those responsible for criminal acts, but this must be understood in light of the rights of the accused under international law. As such, while victims have a right to a fair, independent and appropriate process, they are not entitled to the prosecution or punishment of any particular individual unless the evidence leads to that result.

20. Truth is its own form of reparation. As with the justice prong, the acknowledgement of wrongdoing can facilitate social reintegration and rehabilitation of victims and have a healing effect. Also, the denial of truth can become its own human rights harm. For example, the failure to disclose the location of a person who has been enforcedly disappeared has been recognised as cruel, inhuman or degrading treatment or punishment for surviving family members.[22] By facilitating truth, States can offer clarity of circumstances for victims and their families, providing a needed reparation that helps to restore the rights-holder.

21. Finally, compensation can be used to address pecuniary and non-pecuniary damages, including where the other forms of reparation fail to adequately wipe away and redress the consequences of the harm. Adequate and appropriate compensation requires clearly understanding the types of losses victims suffer. This can include physical, emotional, moral and economic damage. Jurisprudence from the Inter-American Court of Human Rights also acknowledges the loss to one's *proyecto de vida*, or life project, which occurs when an individual's self-realisation is interrupted due to a human rights violation.[23]

22. With truth, justice and guarantees of non-recurrence each being a form of substantive reparation for victims, all the pillars of transitional justice play a role in contributing to reparation. A general lesson from transitional justice for the implementation of Pillar III of the UNGPs is accordingly that all four components of transitional justice need to be recognised as an integral part of the implementation of the UNGPs Pillar III, in that remedies need to include contributions to truth, justice, and guarantees of non-recurrence, in addition to the full spectrum of reparation. For example, the Working Group noted in its report on

[20] The Nairobi Declaration on Women's and Girls' Rights to Remedy and Reparations was created to advance a gender-just remedy and reparations process.

[21] Criminal acts, in this context, should be understood as including (but not necessarily limited to) torture and cruel, inhuman, or degrading treatment or punishment, extrajudicial killings, arbitrary detention, enforced disappearance, genocide, war crimes, crimes against humanity, and international acts of aggression as defined by the Rome Statute of the International Criminal Court. Statutes of limitations should not apply to these crimes. A/RES/60/47 at para 6. The Convention against Torture, art 4(2), further requires "appropriate penalties which take into account [the] grave nature" of the crimes identified in that treaty.

[22] *Francisco Dionel Guerrero Larez v Venezuela*, Committee against Torture Communication No. 456/2011, U.N. Doc. CAT/C/54/D/456/2011 (2015) at para. 6.10.

[23] See, e.g., *Loayza Tamayo v Peru* (IACtHR) (1998), at paras. 144-54; *Myrna Mack Chang v Guatemala* (IACtHR) (2003) at paras. 248(e), 253.

business, human rights and conflict that there needs to be an emphasis on Pillar II and heightened human rights due diligence as a means of preventing future harm in post-conflict settings.[24] This could be viewed as a step in furtherance of a guarantee of non-repetition.

III. Challenges and lessons learned from transitional justice

23. In situations of transitional justice, societies face significant challenges when trying to uphold their legal obligation to provide prompt, adequate, and effective remedies and reparation. First, the seriousness of the violations or abuses often makes full restitution or even full compensation an unattainable goal. Second, the number of violations or abuses and victims usually overwhelms the capacity of institutions to respond on a case-by-case basis. Third, institutions in transitional societies are often weak, which further and significantly affects the capacity to mobilise efforts and resources to meet the full range of the State's human rights obligations and rule of law needs.

24. Given the complex conditions in post-conflict and repression settings after the commission of massive violence, it is usually impossible to meet the rights of victims to truth, justice and reparation fully. In recognition of this, a holistic approach to transitional justice that aims to combine the mechanisms under the four pillars of transitional justice has been promoted as better able to achieve justice, enhance all rights at stake and maximise the chances of a successful transition[25] in the aftermath of violations or abuses than a disconnected or disaggregated implementation of each pillar.

25. Over the past four decades, societies worldwide have implemented extraordinary justice measures to address the legacy of mass violence along the lines of what we now consider transitional justice. The demands of victims have not been limited to seeking the satisfaction of their rights to truth, justice and reparation from those who have directly and systematically carried out gross violations of their human rights, such as State agents and members of non-State armed groups. There is a significant experience of transitional justice efforts that have addressed the direct and indirect involvement of businesses and their representatives in repression, violence and gross human rights abuses.

A. Justice

26. The justice component of transitional justice traditionally consists primarily of criminal investigations and trials, although it can also include civil litigation. As the UNGPs recognised, both criminal and civil trials can effectively contribute to access to justice and reparation.[26]

27. Criminal trials have the potential to provide reparation through accountability and justice but also through establishing a judicial truth of what happened. In some contexts, criminal courts also can and do order other forms of reparation, most notably compensation.

28. Civil trials are another possible way to hold businesses to account for their involvement in gross violations or serious abuses of human rights in times of conflict or repressive regimes. Unlike criminal prosecutions, which at the international level and in many domestic jurisdictions are limited to individuals, civil trials can be filed against a corporate entity. Such claims can also face important challenges, from short statutes of limitations to difficulties in establishing the causality of the business involvement for the harm suffered by the victims and the cost and length of such proceedings. The main form of reparation coming out of successful civil litigation tends to be financial compensation.

29. Civil litigation that has the potential to result in a judgment against a business tends to be settled out of court.[27] Such settlements have the advantage of providing victims with a

[24] A/75/212, at para. 106.
[25] A/HRC/21/46.
[26] UNGPs, Principle 17, Commentary.
[27] Leigh A. Payne, Gabriel Pereira, Laura Bernal-Bermúdez, *Transitional Justice from below – Deploying Archimedes' Lever*, Cambridge, CUP 2020, pp.81-87.

certain outcome in their favour and, in some cases, can result in careful reparations programmes designed in agreement with the victims and affected communities that provide different forms of reparation, including symbolic reparation. However, in transitional contexts, such settlements can cause serious problems when they contain confidentiality agreements which stand in the way of transparency, truth, and accountability. Additionally, to fulfil international legal standards as reparation, a settlement would need to include a recognition of wrongdoing, which is rare in such agreements.

30. With regard to criminal justice, the first international experience with this, the Nuremberg trials, highlighted the importance of both the role of economic actors in international crimes committed by the Nazi regime and of preventing their impunity by including in the criminal trials industrialists who collaborated with the regime, for example by knowingly providing the gas used to exterminate millions of concentration camp inmates, or using slave labour in their factories. Thus, even in a context of prosecutions that concentrated on a few perpetrators who were regarded as the most responsible for these crimes, some members of the business sector were regarded as among them.[28]

31. These trials also showed some difficulties with applying criminal law principles to the acts of business actors. First, criminal trials are often limited to individuals. The example of IG Farben, a conglomerate of German chemical and pharmaceutical companies, at Nuremberg highlights that this individualised responsibility cannot adequately capture the economic structures that collaborated with and benefited from the Nazi regime. Nevertheless, in the Farben case, while the prosecution was directed at individuals, the tribunal also referred to the responsibility and role of the corporation and the trial is often perceived as one against the corporation itself.[29] Despite its important role in German war crimes, while the conglomerate was split into several smaller businesses by the allied forces after World War II, the businesses were allowed to continue operating.

32. Moreover, the largely indirect participation of businesses in Nazi crimes in the form of aiding and abetting liability raised questions about what type of assistance results in criminal responsibility of economic actors and what causal link between the assistance and the crime needs to be established. For example, would large loans to the Nazi regime make economic actors responsible for crimes committed by the regime? If so, would they be responsible for all crimes or just some and if so, which? And what mental element would need to be present? Would they need to intend that their assistance facilitated the commission of international crimes, or would it be sufficient that they provided assistance with full knowledge that it would assist in the commission of crimes? The invocation of coercion in some cases also raised difficult legal questions about the reach and appropriateness of this defence. The Nuremberg judgments are not entirely consistent in this respect and these legal

[28] See, for example, US Military Tribunal Nuremberg. *United States of America v. Carl Krauch* et al. ("*I.G. Farben Case*"), Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10.

[29] Andrew Clapham, 'The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States', in P. Malcontent & Thakur (Eds.), *From sovereign impunity to international accountability: The search for justice in a world of States,* (New York: UNUP 2004), pp. 238-239. Anita Ramasastry, Secrets and Lies? Swiss Banks and International Human Rights 31 *Vanderbilt Journal of Transnational Law* 325, 423 (1996) (noting that the trial of corporate officers from the German company I.F. Farben by the USMT "bases much of its factual findings on the role of Farben as a corporate entity or corporate personality.")

problems are still not entirely resolved,[30] though efforts have been made to distil legal principles from the jurisprudence of the international criminal tribunals.[31]

33. More recent efforts to ensure criminal accountability of business representatives within broader transitional justice processes have been taking place in different countries. In Argentina, for example, trials against various businessmen are carried out in ordinary criminal courts decades after the end of the dictatorship, based in part on findings of the Argentinean truth commission CONADEP, which, without having a specific mandate to address the responsibilities of business actors, included information about their involvement in torture and enforced disappearances in its final report. The Argentinean example also shows the importance of civil society and victims organizations in pushing for accountability.[32] Nevertheless, the Argentinean example also highlights the problems with applying criminal law standards to business actors, as, for example, different courts within the same case differed on whether the assistance, in that case signalling a trade union activist for persecution, were linked to the systematic crimes committed against these activists during the Argentinean military dictatorship, or rather motivated by a personal feud. Only in the former case was the criminal prosecution not statute-barred.[33]

34. Criminal trials can also take place outside of the jurisdiction where the crimes occurred, as was the case, for example, with the conviction of Guus Kouwenhoven in the Netherlands for illegal arms trade and complicity in war crimes committed by Charles Taylor in Liberia, where the truth commission investigated and documented his responsibility.[34] Currently, Lafarge is facing charges in France for its involvement in Syria's civil war while Sweden has indicted two Lundin Oil executives for complicity in war crimes in Sudan.[35] While there are a few emblematic cases, the challenges of cross border prosecution remain significant.[36]

35. Colombia is an example of how a comprehensive transitional justice system which includes a specifically designed transitional justice tribunal, the Special Jurisdiction for Peace (SJP), can include the responsibility of economic actors in its remit. At the same time, it highlights the many challenges this raises. In Colombia, business actors can decide voluntarily whether to submit to the competence of the SJP and qualify for the criminal

[30] For overviews of these issues, see, Sabine Michalowski, "Doing Business with a Bad Actor: How to Draw the Line between Legitimate Commercial Activities and those that Trigger Corporate Complicity Liability," (2015) 50 *Texas International Law Journal* 403; Sabine Michalowski, "The Mens Rea Standard for Corporate Aiding and Abetting Liability: Conclusions from International Criminal Law," (2014) 18 *UCLA Journal of International Law and Foreign Affairs* 237; Tara Van Ho, "Business and Human Rights in Transitional Justice: Challenges for Complex Environments," in Surya Deva and David Birchall (eds.), (2020) *Research Handbook on Human Rights and Business* 379.

[31] Sabine Michalowski, Nelson Camilo Sánchez León, Daniel Marín López, Alejandro Jiménez Ospina, Hobeth Martínez Carrillo, Valentina Domínguez Mazhari, Lina María Arroyave Velásquez, *Entre Coacción y Colaboración –Verdad Judicial, Actores Económicos y el Conflicto Armado Colombiano*, (Bogotá: Dejusticia 2018), pp.144-179.

[32] Leigh A. Payne, Gabriel Pereira, Laura Bernal-Bermúdez, *Transitional Justice from below – Deploying Archimedes' Lever*, Cambridge, CUP 2020, pp.267-271.

[33] Sabine Michalowski, Nelson Camilo Sánchez León, Daniel Marín López, Alejandro Jiménez Ospina, Hobeth Martínez Carrillo, Valentina Domínguez Mazhari, Lina María Arroyave Velásquez, *Entre Coacción y Colaboración –Verdad Judicial, Actores Económicos y el Conflicto Armado Colombiano*, (Bogotá: Dejusticia 2018), pp. 173-175.

[34] Gerechtshof 's-Hertogenbosch (Países Bajos), 21 April 2017, 20-001906-10, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2017:1760. For an overview of these cases and lessons learned, see, Tara Van Ho, "Corporate Complicity for Human Rights Violations: Using Transnational Civil and Criminal Litigation," in Sabine Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (2013), pp. 52-72.

[35] For overviews and ongoing updates of these cases, see BHRRC, *Lundin Energy Lawsuit* (re complicity in war crimes, Sudan), https://www.business-humanrights.org/en/latest-news/lundin-petroleum-lawsuit-re-complicity-war-crimes-sudan/; BHRRC, *Lafarge lawsuit (re complicity in crimes against humanity in Syria)*, https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/.

[36] The Working Group on Business and Human Rights addresses this topic in a report to the UN Human Right Council, A/HRC/35/33.

benefits the SJP offers. These range from waivers of prosecution to a penalty of five to eight years of restorative sanctions with effective deprivation of liberty outside of prison to a penalty of five to eight years of imprisonment, depending on the procedural moment when they recognise their responsibility. These benefits are conferred in exchange for contributions to truth, reparation and guarantees of non-recurrence. The voluntariness of the adhesion, which was at least in part the result of political pressure of the highly powerful economic sector, causes problems of how to incentivise it, particularly given the widespread impunity this sector enjoys in the ordinary criminal jurisdiction and the distrust it has shown towards the impartiality of the SJP.[37] This shows the importance of creating trust in transitional justice mechanisms, and maybe even more prominently the importance to combat impunity also in ordinary criminal jurisdictions and to develop effective ways to prosecute economic actors.

36. An example of a combination of transitional justice measures that resulted in an out-of-court settlement is the case of Volkswagen (VW) Brazil because of complicity with the Brazilian military dictatorship in 1964 and 1985. In 2014, a truth commission made preliminary findings about the collaboration of VW with the repressive regime that led to torture and illegal detention of workers. In 2015, the Workers' Forum for Remembrance, Truth, Justice, and Reparation filed a civil claim with the Public Prosecutor's Office, which, despite the Brazilian amnesty laws, allowed for a preliminary investigation and judicial truth-finding. The civil case was settled by way of an agreement according to which VW paid about 6.4 million US dollars as compensation for the victims and contribution to initiatives promoting human rights. The agreement was highly criticised because it did not result in satisfaction and, for example, did not include any reparation in the form of memorials. More importantly, still, it did not include a recognition of responsibility.[38]

B. Truth and satisfaction

37. In addition to justice mechanisms, official and unofficial truth mechanisms have addressed the issue of business accountability to varying degrees and in different ways. For instance, truth and reconciliation commissions have included analysis of the relationship between State, paramilitary and subversive violence and economic actors in their reports. Some have gone as far as naming the businesses that, in the respective countries, were directly or indirectly involved in the violence. To a lesser extent, truth reports have connected these findings with recommendations on reparations and institutional reform to guarantee non-repetition of violations or abuses. Interestingly, these commissions included the role of economic actors, whether or not their mandate specifically required them to do so.[39]

38. For example, the South African Truth and Reconciliation Commission (TRC) held a special hearing to determine the role of the business sector in apartheid-related crimes. The hearings and resulting reports made an important contribution to demonstrating the different ways in which businesses can be involved in gross human rights violations. The South African truth commission distinguished different levels of involvement with the apartheid regime. It determined that businesses had the greatest responsibility when they co-designed regulatory policies together with the government and medium-level responsibility when they collaborated with the government through financing or by providing arms and logistical support that made the commission of apartheid crimes possible. On the lowest end of responsibility, the commission pointed to businesses that benefitted from carrying out business in a context of low wages and health and safety standards and where only white business had access to land ownership. While the South African TRC recommended reparations payments from the business sector, it did not distinguish these according to the

[37] Sabine Michalowski, Nelson Camilo Sánchez León, Daniel Marín López, Alejandro Jiménez Ospina, Hobeth Martínez Carrillo, Valentina Domínguez Mazhari, Lina María Arroyave Velásquez, *Entre Coacción y Colaboración –Verdad Judicial, Actores Económicos y el Conflicto Armado Colombiano*, (Bogotá: Dejusticia 2018), pp.183-189.

[38] Juan Pablo Bohoslavsky, Juan Cruz Goñi, "Negociando la rendición de cuentas por violaciones de los derechos humanos: el caso del acuerdo Volkswagen do Brazil," Homa Publica Revista Internacional de Derechos Humanos y Empresas, Vol. V | Nº. 01 | Jun 2021.

[39] Leigh A. Payne, Gabriel Pereira, Laura Bernal-Bermúdez, *Transitional Justice from below – Deploying Archimedes' Lever*, Cambridge, CUP 2020, pp.165-213.

different levels of involvement in the apartheid crimes and neither did it make recommendations on how individual businesses should provide reparation. Rather, it made general recommendations regarding the introduction of a wealth tax and business contributions to a reparations fund.[40]

39. Other truth commissions, such as those of Liberia and Sierra Leone, investigated and documented the role of particular business sectors in the respective armed conflicts and brought to light the economic interests and alliances that fuelled them. The Liberian TRC, for example, had the explicit remit to include in its investigations economic crimes, but also documented gross human rights violations in the timber and mining industries, concluding that: "all… corporations including shareholders and corporate officers and their agents affiliated with or who aided and abetted warring factions or armed groups share responsibility for the commission of those human rights violations including violations of international humanitarian law, international human rights law, war crimes." It further found that: "private companies benefited from dealings with corrupt public officials to obtain lucrative natural resource concessions and exclusive licenses and, in many instances, formed corporate entities with perpetrators of grave human rights violations."[41] As a consequence, it recommended the creation of a reparation trust fund to compensate victims of economic crimes, to be funded through a mix of money received through civil and criminal trials against those responsible, tax arrears from businesses and asset freezing and recovery.[42]

40. The main reparatory effect of the work of truth commissions is to satisfy victims' right to truth. They also play important roles in determining a comprehensive narrative of the conflict, the violations or abuses that were committed and in many examples include the role of businesses, economic interests and economic structures that might be at the root of conflict or repression, exacerbate it and have long-lasting consequences for victims and societies. In doing so, they identify responsibilities without being bound by strict substantive and procedural rules. Through this process, moral responsibilities for having benefited from a context of violence, for example, can also be revealed, even though this would not necessarily result in legal responsibility. However, their reports often formed the basis of future criminal and civil litigation against economic actors, such as the South African TRC report for the *South African Apartheid Litigation* in US courts or that of the Liberian TRC for the prosecution of Guus Kouwenhoven in the Netherlands. Furthermore, truth commissions can make recommendations about what needs to be done to avoid future recurrence of conflict and violence and ways to provide reparation.

41. These experiences present several important overarching lessons. First, they show that, in contexts where business has played a role in gross violations of human rights and/or international crimes, transitional justice processes cannot be complete if their mechanisms do not systematically and comprehensively address this relationship. They also demonstrate that different mechanisms play different roles in this context and can complement one another. For example, truth commissions can investigate and establish a broader and more structural truth and narrative than is the case in legal proceedings, whose role is to determine individual responsibilities. Experiences such as that of civil litigation initiated by victims of apartheid as a consequence of South Africa's failure to act on the TRC's recommendations and provide adequate corporate reparation also show that victims will persist in seeking creative ways to achieve accountability and satisfaction of their rights.[43]

C. Guarantees of non-recurrence

42. The notion of guarantees of non-recurrence (GNR) relates to a combination of deliberate, diverse interventions that contribute to a reduction in the likelihood of recurring violations or abuses. The core function of GNR is preventive in nature.[44] A wide range of

[40] South African Truth and Reconciliation Commission, *Final Report*, Volume 4, Chapter 2, (1998), and Volume 6, Chapter 5, 2003.

[41] Republic of Liberia Truth and Reconciliation Commission, Volume Two, VI, 2009.

[42] *Ibid*. Volume Three, Title III, p.43.

[43] *In re South African Apartheid Litigation*., 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009).

[44] A/HRC/30/42.

measures have been taken by transitional States in pursuit of these objectives, including measures aimed at reforming institutions, disbanding unofficial armed groups, repealing emergency legislation incompatible with basic rights, vetting the security forces and the judiciary, protecting human rights defenders and training security forces in human rights.[45]

43. As guarantees of non-recurrence are manifested through policy options aimed at preventing the repetition of the past, they are highly contextual and should redress the underpinning root causes of the violence. Various reform measures aimed at ensuring the non-repetition of the past have addressed the impact of businesses on human rights.

44. For example, South Africa adopted a Black Economic Empower Act, which aimed to address the economic impact of apartheid as it manifested in the mining industry by diversifying mining ownership. This was particularly important as the truth commission had determined that mining companies had partnered with the South African government to develop regulatory standards that had institutionalised and exacerbated the apartheid rule within the mining industry.[46]

45. However, the GNR pillar remains under-analysed in theory and under-exploited in practice, especially regarding measures to prevent corporate abuse where the multidimensional character of conflict and rights violations and abuses needs to be matched by multifaceted responses. In this sense, GNR is one of the most promising spaces within the transitional justice agenda for private sector participation. It also relates clearly to the prevention and mitigation focus of the UNGPs, which emphasises the importance of avoiding human rights violations and abuses rather than merely remedying them after the fact.[47] The broad and flexible use of this pillar allows transitional societies to explore issues such as good corporate governance regulation to avoid repetition, effective and comprehensive deterrence of corporate abuse, the design and implementation of bottom-up non-repetition measures at a grassroots level, the enactment of human rights education programmes with a focus on the role of business, and research into the links between corruption and the perpetuation of conflict. Other GNRs to address business-related abuses could be introducing corporate criminal responsibility, dissolving businesses that contributed to human rights violations or abuses, or preventing them from operating in the transitional country or from participating in public procurements.

D. Holistic approach

46. Studies have shown that the success of transitional justice measures to achieve the aims of lasting peace and democratisation is greatest if the various mechanisms work side by side.[48] Combined, extrajudicial truth-seeking and judicial accountability measures have highlighted the important role business have played in many conflicts and the responsibilities they incurred. On the other hand, the global experience shows that there is still a long way to go for these connections to have the centrality they should have, both in the work of transitional justice mechanisms and on the agenda of national and international decision makers.

47. Moreover, these experiences show that a normative and comprehensive policy framework is needed to pursue social and individual healing following mass atrocity. States must adopt a comprehensive approach and make available redress through a combination of policies that provide recognition to victims, promote trust in institutions, contribute to the strengthening of the rule of law and encourage social integration and reconciliation. Operationalising an institutional system that coordinates these different interventions

[45] Maja Davidovic, The Law of 'Never Again': Transitional Justice and the Transformation of the Norm of Non-Recurrence, International Journal of Transitional Justice, Volume 15, Issue, 2, July 2021, P. 386-406.

[46] For an overview of the accusations and situation, *see* Charles P Abrahams, 'Corporate Accountability, a Tough Tool for Transitional Justice: A Selective Overview of the South African Experience' in Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (2013).

[47] UNGPs, Principle 17.

[48] Olsen, Tricia; Payne, Leigh; Reiter, Andrew; 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy', 32(4) *Human Rights Quarterly* 980-1007 (2010).

presents a significant challenge, requiring the highest level of planning, resources, oversight and accountability. Consequently, the obligation to create and administer such a system rests with the State.

E. Designing reparation mechanisms

48. While different transitional justice measures can yield considerable restorative effects, States must ensure that specially designed mechanisms exist for individual and collective reparations. Reparation is not just a mechanism for the transfer of funds or material assets to the public. A scheme that does not distribute a direct benefit to the victims cannot be considered reparations.[49]

49. Reparations mechanisms often combine different grievance redress options, including administrative reparations programmes, legal reform to guarantee practical and preferential access to courts and funds for collective reparations projects. No society has achieved the goal of adequate reparations by resorting to a single mechanism or form of reparation. On the contrary, the most successful experiences have combined instruments to strengthen their potential, guarantee greater access to victims, and rectify flaws in their institutional offerings.

50. Reparations programmes are administrative procedures designed to respond to a broad universe of cases. These programmes are established to avoid some of the difficulties and costs associated with litigation, particularly those that arise in post-conflict situations where evidence may have been destroyed or the domestic legal system temporarily adapted to facilitate human rights violations or abuses that benefit a side in the conflict. As such, an administrative reparations programme should provide claimants with faster results, lower costs, more flexible standards of proof, non-adversarial procedures and a greater likelihood of receiving benefits compared to what they might expect from similar court proceedings. However, by their nature, these programmes are narrowly tailored to provide more focused reparations. No administrative reparations programme has been designed to distribute the full range of benefits grouped under the categories of satisfaction and guarantees of non-repetition in international law.[50]

51. Several truth commissions recommended business contributions to reparations programmes, but no examples of good practice as to the implementation of such recommendations currently exist. Some businesses contributed to the South African reparations fund, but the total amount collected from businesses was quite limited, particularly when compared to the Truth and Reconciliation Commission's findings on businesses' responsibilities for apartheid.[51] Moreover, as others have acknowledged, those "financial contributions should not be understood as a form of compensation given that they were not a response to the individual harm suffered by victims and were not used to redress victims".[52] Business contributions to such programmes could significantly enhance the resources available for providing victims with reparation.. However, there are limits to transposing the logic of State-based reparation programmes to business actors. With States, lower than full reparation is sometimes deemed acceptable if delivered through administrative reparations programmes that form part of more comprehensive transitional justice as the State needs to balance a whole array of competing obligations and interests. Businesses do not face the same constraints and are expected to provide full reparation.

52. Reparations programmes have been considered the most victim-centred measure of transitional justice policies. The task of implementing reparations measures should be seen as a complex justice endeavour and not as a one-off intervention to hand over a benefit or service. Justice is an experience that is nourished by both the process and the outcome of the

[49] A/69/518 at 21.

[50] A/HRC/42/45.

[51] Between 1999 and 2011, the Business Trust collected 1.2 billion rand from 140 companies. In contrast, a single lawsuit brought against a single mining company sought 7 billion dollars in compensation. *Compare* Clara Sandoval and Gill Surfleet, Corporations and Redress in Transitional Justice Processes" in Michalowski (cf. footnote 34) 93 at 101; "Workers file $7bn Uranium Lawsuit," *BBC* (5 May 2003), http://news.bbc.co.uk/1/hi/business/3001609.stm.

[52] Sandoval and Surfleet, Id., at 101.

interaction. Even interventions that could be considered economically generous can lead to failed reparations processes and experiences of revictimization.

53. Justice cannot be achieved without considering the victims' reparation needs. Dealing with the past and ongoing harm is a complex and multifaceted subject for victims and affected communities. Victims and affected communities expect and deserve that any process put in place to deal with the past is victim-centred, requiring consultation, communication and integration of victims with and into the design.

54. In practice, some reparations mechanisms have integrated victim centrality as a founding principle, with substantive and procedural measures aimed at reinforcing the human rights of victims in the processes.[53] Concretely, this principle has been reflected in the recognition that victims are rights holders that have agency to effectively participate in certain proceedings, that victims have the right to have access to relevant information and to be adequately protected and that their role in the procedure has a meaningful impact on the shape of substantive outcomes.[54]

55. A victim-centred approach to reparations implies that victims are essential stakeholders in reparations processes. However, it does not mean that victims are the sole decision makers, as their interests must be weighed against the public interest and the viability of the reparations programme.

56. Decisions about who will qualify for reparations in transitional contexts frequently need to be made in the face of acute shortages of financial, human and institutional resources. All administrative reparations programmes have made decisions about the type of violations or abuses that trigger inclusion in the programme. This is one of the most consequential decisions of a reparations programme as it establishes the scope of the policy and conveys critical political and symbolic messages in contexts plagued by political and social division. Selection criteria that disqualify groups of victims from access to reparations simply because they are considered political rivals or because of their religious, political or other affiliations are prohibited under international law.

57. Reparations processes should be sensitive to the physical, social, and cultural barriers in society. They must also reflect the economic and social context in which they are situated and recognise victims' often unequal access to the state bureaucracy and the obstacles they may face in accessing reparations. Careful gender and generational assessment of the effects of violations and abuses is also necessary to understand the impact of violence on different constituencies. Reparations programmes should always be based on gender and culturally appropriate assessments. Addressing the unique needs of historically discriminated groups will require creative intervention approaches. The participation of people from these social groups is critical to identifying possible barriers to access and the institutional responses needed to combat them.

58. Transitional justice processes are often long, dynamic and non-linear. A reparations policy should be able to identify opportunities for intervention at each stage and prevent future bottlenecks or setbacks. Some positive experiences have adopted measures to prepare for reparations even before the post-conflict setting, including mapping activities, promoting leadership and political action of impacted communities and providing humanitarian assistance measures. In some cases, reparations programmes have been established in the context of protracted armed conflict. Early recovery contexts interventions, which can be fundamental to the success of a reparations policy, must especially consider the risks they may generate for victims and communities, including security risks.[55]

59. Reparations programmes are more frequently implemented in reconstruction and peacebuilding phases. The time frame for reparations can extend both decades into the past (based on the date of commission of the violations or abuses to be remedied) and into the future. In fact, the most successful reparations programmes have been in operation for several decades and have included arrangements to address intergenerational grievances. The

[53] Article 12(c), Sri Lanka Office for Reparations Act 2018.

[54] See Luke Moffett, Justice for Victims before the International Criminal Court, Routledge (2014), pp. 43- 44.

[55] A/HRC/36/50 at paras. 74-76.

passage of time, however, creates enormous challenges for the operation of these programmes. States and businesses involved in these processes must plan interventions that can be implemented as quickly as possible but be prepared to respond to the justice needs arising from the conflict for as long as necessary. The mere passage of time should not constitute a factual or legal barrier for victims to access their right to reparations.

F. Implementing transitional justice processes

60. Central to the implementation of reparations programmes is policy coherence so that the domestic and international legal commitments of the State are focused on securing the right to remedy via transitional justice mechanisms while securing peace and facilitating sustainable development. The failure to ensure policy coherence can undermine the long-term implementation of reparations programmes. As the Working Group recognised in its 2021 report on international investment agreements, there are concerns that commitments made through international investment agreements can prevent the effective realisation of the human right to remedy and reparation.[56] When South Africa attempted to implement a guarantee of non-recurrence via its Black Economic Empowerment Act, it was forced to defend the measure before an investment tribunal.[57] Given the power investment arbitrational tribunals can exercise, it is important to ensure these agreements – along with domestic company, tort, property, constitutional and, regional free trade agreements and investment agreements – are prepared to support the remedial efforts and other transitional justice initiatives.

61. Reparations policies should aim to cover as many victims as possible and acknowledge them collectively and individually. Decisions about who qualifies as a beneficiary of reparations should be based on a harm-based approach. International human rights standards provide criteria for identifying victims based on international principles such as justice, equality and non-discrimination.[58]

62. Although no judicial system will be able to guarantee comprehensive and timely redress in a context of mass violence, access to judicial remedy is a component of the right to an effective remedy that should be available in transitional contexts. The practice of international and domestic courts in different regions of the world provides valuable lessons on how judiciaries, endowed with appropriate normative frameworks, can flesh out the content and reach of the different components of reparations set forth by international law.[59] The recognition of the right to access judicial remedy as a constitutional right has been a crucial tool for domesticating international norms and addressing domestic procedural barriers that would otherwise render this right nugatory.

63. Effective non-criminal judicial remedies should be another critical component of a comprehensive reparations system.

64. The implementation of transitional justice programmes can be costly. The implementing State and those providing it with international assistance and cooperation, including technical support, need to give consideration to how these programmes are financed. Some States have sought voluntary contributions from corporations, while the South African Truth and Reconciliation Commission recommended the adoption of a wealth tax. Recently, civil society organizations have called for States to use assets secured through the criminal prosecution of those responsible for violations or abuses of human rights and violations of humanitarian law to provide reparations to victims.

[56] A/76/238 at para. 20; see also, Tara Van Ho, 'Is it Already too Late for Colombia's Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives,' (2016) 5 *International Human Rights Law Review* 60-85.

[57] *Piero Foresti v South Africa*, ICSID Case No. ARB(AF)/07/01.

[58] UN General Assembly, Basic Principles on Reparation.

[59] Clara Sandoval (2018) Two steps forward, one step back: reflections on the jurisprudential turn of the Inter-American Court of Human Rights on domestic reparation programs, The International Journal of Human Rights, 22:9, 1192-1208.

G. Managing conflicting housing, land and property rights

65. Disputes over land are often a cause of conflict or arise during conflicts. Additionally, conflicts will often result in the destruction of property and housing and the displacement of people from their land and property. Addressing unlawful displacements and the restitution of housing, land and property (HLP) is an important but particularly challenging component of transitional justice in the wake of mass violence and post-conflict recovery. Not only can conflicts over land tenure and land use lead to outbreaks of violence, but land can also become a weapon of repression or war – through the use of land mines or ethnic and other forms of cleansing.[60]

66. Significant experience with transitional justice indicates that postponing the resolution of land conflicts can render peace and justice efforts futile.[61] HLP rights do not re-establish themselves after conflict; issues such as forced displacement, expropriation, cleansing of various forms, return processes, disputes between the displaced and those currently living without their consent in their homes (secondary occupants) and land grabbing all take significant time and societal effort to resolve.

67. Experiences such as those of South Africa, Bosnia, Colombia and Kosovo show that transitional societies will generally face massive land reform challenges. Among these challenges are the reversal of violent dispossession, the provision of land to historically dispossessed communities, the promotion of productive linkages that promote rural development especially for small and medium producers, the recognition and demarcation of territorial rights of ethnic communities and the reversal of the environmental degradation produced, or accelerated, by violence. However, these policy objectives also often conflict with each other, as do claims based on overlapping rights – i.e., the conflict between the forcibly displaced and second occupants.

68. Over two decades of experience implementing administrative and judicial HLP rights claims review systems have given rise both to the systematisation of normative standards[62] and essential lessons on the design and implementation of land rights policies. Some of these lessons are of particular importance regarding the involvement of businesses in land and property disputes. For instance, experience shows that any system must take into account the power imbalances that may exist between claimants so that legitimate subjects of rights do not have their claims rejected for lack of access to legal representation or evidentiary material such as registries, titles, deeds, demarcations, maps and cadastres. On the other hand, the experience of countries such as Kenya has shown that programmes must consider both statutory and customary HLP systems. Not only will a rapid transfer from a traditional to a statutory system often not be possible, but also, to achieve land rights protection, titling is not necessarily the only possible or desirable option at hand.[63]

69. Legal and truth-seeking mechanisms in Colombia and Guatemala provide accounts of how companies have resorted to violence and been complicit in land displacement or taken advantage of the general context of violence to grab land for economic exploitation.[64] In some cases, the ruling powers permitted or encouraged land grabs by, for example, granting licenses or concessions to companies in breach of the legitimate rights holders' entitlements.

70. While in Guatemala, the truth commission's findings have not led to any effective remedy, the situation is different in Colombia. To begin with, Colombia's Victims and Land Restitution Law provides for a series of institutional mechanisms for the reversal of

[60] See, Statement of eminent jurists on legal obligations when supporting reconstruction in Syria (24 September 2018). Available at https://media.business-humanrights.org/media/documents/files/documents/Eminents_Jurists_Statement_Syria_reconstruction.pdf.

[61] U.N Secretary-General, The United Nations and Land and Conflict. Guidance Note of the Secretary General (March 2019) at. 9-10.

[62] See, Deng Principles & Pinheiro Principles.

[63] Jon D Unruh, Musa Adam Abdul-Jalil, Housing, Land and Property Rights in Transitional Justice, *International Journal of Transitional Justice*, Volume 15, Issue 1, March 2021, at 2.

[64] See CEH (Comisión para el Esclarecimiento Histórico). (1999). *Guatemala: Memoria del silencio.* Guatemala: CEH.

dispossession in cases where there is evidence of involvement of economic actors in the displacement or dispossession. In addition, the law punishes civilly, with the loss of the dispossessed property, to investors who acquired property located in conflict-ridden areas if they do not prove that they conducted a thorough title study before purchasing to guarantee they are not taking advantage of violence and dispossession. In this regard, the law provides for a reversal of the burden of proof so that companies must demonstrate their good faith in transactions carried out in certain areas.[65] To this extent, the Colombian model goes beyond the formula adopted in South Africa, which required the State to purchase the dispossessed plots from their current owner to hand them out to those dispossessed. The South African approach has been criticised not only because it demanded massive public resources but also because it rewarded those who had participated in the violent dispossession.

H. Understanding the relationship with other post-conflict initiatives

71. Experience calls for an integrated approach to the design of reparations policies and recovery programmes. On the one hand, the transformative capacity of reparations mechanisms is strengthened when they are complemented by reparation-centric development and peacekeeping policies. In the same vein, to remove access barriers, reparations usually need to be pre-empted by a series of emergency humanitarian and basic social assistance efforts.

72. Yet, reparations programmes serve a distinct purpose from these other initiatives. Reparations are a legal consequence of wrongful conduct and are aimed at wiping out the consequences of that wrongdoing. As such, they are owed to specific individuals and communities. Other post-conflict initiatives – including developing programmes and peacekeeping or peacebuilding initiatives – are aimed at strengthening society as a whole or promoting economic development. Initiatives to protect and further the protection of economic and social rights are owed to individuals independent from their status as victims and they can usually not be regarded as reparation. Each goal and mechanism are significant but their purposes are distinct and States must not ignore their legal obligation to provide remedies in favour of other interests and obligations.

73. Similarly, a business's responsibility to provide remediation and participate in transitional justice initiatives is the result of causing or contributing to a negative impact on human rights. A business may also choose to support other initiatives, but just as corporate social responsibility should not be confused with business and human rights,[66] neither should a business's voluntary participation in post-conflict development initiatives be confused with its responsibility to remediate the human rights abuses which it causes or contributes to. Whether, when, and how a business provides remedies needs to be considered in light of its business and human rights responsibilities under Pillar II of the UNGPs and predicated on the international legal standard of acknowledging wrongdoing.

IV. The responsibility of third-party States and international organizations

74. Often, financial support provided by third-party States and international organizations to States engaged in transitional justice is conditioned on reforms that facilitate and protect business activities. This is based on the belief that a quick economic recovery is in everyone's interests. Nevertheless, business development and investment without purpose and adequate regulation can undermine the effective implementation of transitional justice and other reparations programmes. States and international organizations engaged in financing post-

[65] Sections 77 and 78 of the Victims Law (Ley 1448 de 2011, Ley de Víctimas y de Restitución de Tierras y sus Decretos Reglamentarios).

[66] *See* Anita Ramasastry, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability' (2015) 14 *Journal of Human Rights* 237-59.

conflict reforms and development have obligations that attach to their activities.[67] Such obligations arise from the UN Charter's commitment to international peace and security and the obligation of international assistance and cooperation in the International Covenant on Economic, Social and Cultural Rights.

75. As recognised in the UN Guiding Principles, third-party States can also play a role in supporting and facilitating business accountability and reparation through transitional justice. The same is true for international organizations. Businesses' "home States" can and have supported transitional justice and remediation programmes in a variety of ways. They can undertake their own investigations, prosecutions and punishments of businesses engaged in criminal breaches of human rights and humanitarian law.[68]

76. Home States can also provide mutual legal assistance to post-conflict States investigating a business's involvement in human rights violations. The provision of mutual legal assistance is sometimes a complex undertaking, but it has been made easier by treaties such as the United Nations Convention against Corruption. As such, States already have a strong model for facilitating mutual legal assistance and reducing barriers to effective and adequate investigations, prosecutions and punishments.

77. Home States have also supported efforts at remediation by removing barriers to transnational civil litigation for human rights violations or abuses. Similar to criminal investigations, the availability of transnational venues for litigation can initially allow the State engaged in post-conflict transitions to allocate financial and personnel resources in other areas even while rights holders secure remedies. Each context for transitional justice is different and third-party States may be faced with difficult questions as to when and how to facilitate transnational litigation while respecting the processes in the transitioning State. Courts may be afraid of interfering with the difficult balances sought through a comprehensive approach to transitional justice. For example, when courts in the US were asked to hear cases centring on corporate responsibility for South Africa's apartheid policies, the South African government initially expressed concern that the cases could compromise its chosen approach to transitional justice. The courts in the US expressed similar reservations.[69] There are no easy solutions to this, but home States should not dismiss transnational litigation simply because the context in the host State is complex. Instead, respect for the rights of the victims should be central to the decision-making process and home States can consider a variety of ways to ensure they also respect the processes and policy choices of the transitioning State. If done appropriately, the result can support the host State's transitional justice efforts rather than undermine them. For example, after some of its concerns were allayed through the procedural development of the US case, the South African government reversed its position and found the US courts to be "an appropriate forum to hear the remaining claims".[70]

78. Third-party States and international organizations also play a role in ensuring an adequate enabling environment. Unfortunately, they can often encourage States engaged in transitional justice to pursue either directly conflicting policy initiatives or at least initiatives that have the potential to conflict or that lack policy coherence. This can happen when third-party States, international financial institutions and international organizations divide advisory responsibilities amongst themselves for various aspects of the transition and post-conflict reconstruction, development and peacebuilding. Without adequate coordination, this divide-and-conquer approach can lead to regulatory gaps and missed opportunities. For

[67] Statement of eminent jurists on legal obligations when supporting reconstruction in Syria (24 September 2018). Available at https://media.business-humanrights.org/media/documents/files/documents/Eminents_Jurists_Statement_Syria_reconstruction.pdf.

[68] The area of criminal prosecutions by home States is still an avenue that requires further action. See A/HRC/35/33. See also Amnesty International and ICAR, *The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases* (July 2016) http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf.

[69] *See* Tara Van Ho, "Corporate Complicity for Human Rights Violations: Using Transnational Civil and Criminal Litigation," in Sabine Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (2013), pp. 69.

[70] *Ibid*.

example, if one State or international organization encourages or requires the development of robust investment agreements and domestic investment laws without coordinating with another State or international organization providing advice on HLP rights, the transitioning State may end up ratifying investment agreements that prevent it from effectively implementing HLP restitution and reparations programmes. This lack of policy coherence does not only lead to a breach of the transitioning State's obligations but it also represents a breach of obligations by the third-party State and international organizations.[71]

V. Conclusion

79. **This report has provided an overview of the different forms of reparation recognised in international law and shown how transitional justice has applied international standards on reparation to the responsibilities of businesses for their role in abuses committed during periods of conflict or repression. Transitional justice is based on the four pillars of truth, justice, reparation and guarantees of non-recurrence, each of which is in itself a form of reparation. Based on an analysis of transitional justice experience in this respect and the challenges it has brought to light, an Annex to this report provides guidelines for States and businesses with regard to meeting reparation standards as part of the implementation of Pillar III of the UN Guiding Principles on Business and Human Rights focused on access to remedy.**

[71] A/76/238 at para. 20; Tara Van Ho, 'Obligations of international assistance and cooperation in the context of investment law' in Mark Gibney, et al., (eds.) *Routledge Handbook on Extraterritorial Human Rights Obligations* (2021), p. 325.

Annex

Guidelines for designing and implementing transitional justice reparations processes involving business actors as part of the right to an effective remedy under Pillar III of the UN Guiding Principles on Business and Human Rights

1. Designing and implementing reparations processes requires strategic thinking and balancing practical considerations and legal obligations that can sometimes sit in tension with one another. This Annex is aimed at identifying legal standards and good practices for States (including third-party States), businesses, stakeholders, and international organizations to consider when developing or implementing reparations frameworks that involve the role of business as part of transitional justice. An effective strategy will embody a victim-centred and gender-sensitive approach throughout the planning and implementation and will ensure victims have access to the procedural protections and substantive reparation they are entitled to as a matter of human rights law.

2. These guidelines contain standards and recommendations that are grouped into five areas of concern: (A) the general considerations on the provision of reparation; (B) the centrality of victims to the design, implementation and outcome; (C) the procedural mechanisms through which reparation can be granted; (D) the substantive reparation to be provided; and (E) the relationship between reparations programmes and post-conflict reconstruction, peacebuilding or development initiatives, with particular attention paid to the responsibility of third-party States and international organizations.

3. These guidelines should be read in tandem with Pillar III and Principles 25 to 31 of the UN Guiding Principles on Business and Human Rights, which focus on the role of States and businesses in providing victims of business-related human rights abuse with an effective remedy.

I. General considerations on procedural and substantive aspects of granting access to an effective remedy

4. States must comply with their obligation to guarantee victims' rights to truth, justice, reparation and non-recurrence with regard to violations and abuses of human rights and violations of international humanitarian law caused or contributed to by businesses. This includes the obligation to investigate, prosecute and punish such abuses.

5. Reparation as a legal right of victims who suffered violations or abuses of their human rights needs to be provided in line with international human rights law. Reparation in this legal sense requires recognition of responsibility by business actors. Apologies that do not include such a recognition do not meet the legal expectations for reparation.

6. Reparation as an obligation to redress harm caused to victims by businesses should be clearly distinguished from other forms of remedies, such as contributions to post-conflict reconstruction that can be provided without any wrongdoing and therefore do not require any recognition of responsibility. Therefore, reparation needs to be clearly distinguished from corporate social responsibility (CSR) initiatives and other business activities which are aimed towards improving the situation of victims, but without being based on a recognition of having caused harm that these initiatives are aimed at repairing.

7. Legal reparations imposed on businesses as a consequence of wrongdoing should include all forms of reparation, i.e., restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

8. Businesses must not only deliver on their legal responsibility to repair but should also consider engaging in apologies and other forms of symbolic repair to explicitly respond to the moral obligations owed to victims to recognise their wrongdoing.

9. Access to judicial remedy is a component of the right to an effective remedy. Therefore, a comprehensive reparations policy should include a clear strategy to strengthen the judiciary so that competent, independent and impartial courts can hear reparations claims from those who wish to submit them.

10. In transitional justice settings, it is crucial to recognise the different roles businesses might have played during the conflict or repression, which can range from contributing to serious human rights abuses to having been a victim themselves. This needs to be reflected in transitional justice mechanisms which should investigate the role of businesses in all its aspects and consider their obligation to provide as well as their right to receive reparation.

11. Transitional justice mechanisms need to engage with the full range of forms of complicity by businesses in human rights abuses. Such engagement needs to address corporate involvement in the design and authorship of policies and legislation that allows or facilitates human rights abuses, their direct involvement in abuses, different levels of aiding and abetting, e.g., through financing human rights violations, the provision of arms, and the way that they have profited from abusive policies.

12. When addressing businesses' responsibility, States, transitional justice mechanisms and businesses themselves should consider corporate governance failures that led to, facilitated or failed to stop their involvement in human rights abuses. Consideration should be given to whether and how mandatory human rights due diligence legislation could have helped prevent the abuse and how it might act as a guarantee of non-recurrence moving forward.

13. Reparations programmes need to bear in mind differences between businesses. Some businesses might have caused greater damage than others or have benefitted significantly more from the conflict or repression than others. This results in different responsibilities for reparation and remediation. Reparations requests or orders should reflect the company's own responsibility.

14. While businesses are entitled to pursue their legal rights and defences, they should also seek ways to constructively participate in various judicial and non-judicial transitional justice mechanisms.

15. Businesses should refrain from conditioning their participation in transitional justice mechanisms on immunity from criminal or civil litigation as such conditionality itself contributes to harming the human right to an effective remedy.

16. Businesses must apply conflict-related principles in all phases of the reconstruction and transitional justice process, including heightened due diligence. Businesses that had no connection to past violations or abuses, and even those that did not even operate during the period, may become liable for actions that impede reparations to victims. Failure to comply with the principles of responsible investment has resulted, for example, in further institutionalising the impacts of crimes and in consolidating land and housing dispossession.

II. The centrality of victims

17. Reparation needs to be victim-centred. A victim-centred approach to remedies requires a participative and active role of victims, including impacted communities and context-specific multidimensional systems. Communities affected by business-related abuse should be part of the decision-making process at all stages of the remediation process. Their needs and priorities should shape the evolution of any remedies proposed by government institutions or businesses. A victim-centred approach in the reparations procedures is an opportunity to empower victims and treat them with dignity and respect. Every stage of the process should be designed to build trust and confidence.

18. Reparations programmes should always be based on gender-sensitive and culturally appropriate assessments with close involvement of the victims. Addressing the unique needs of historically discriminated groups will require creative intervention approaches. The participation of people from these groups and the ongoing protection of human rights

defenders is critical to identifying possible barriers to access and the institutional responses needed to address them.

19. In order to repair communities and the environment, a victim-centred remedies approach must take into account the past, the present, and the future, that is, the circumstances surrounding corporate abuse, the current circumstances to avoid revictimization, and future conditions to guarantee non-repetition.

III. Different mechanisms to provide reparation

20. Reparations mechanisms should reflect the four pillars of transitional justice – truth, justice, reparation and guarantees of non-recurrence – which all represent forms of substantive remediation.

21. Truth-telling is a substantive form of reparation in transitional justice contexts, which can, for example, be provided through truth commissions. Mandates of such commissions should include exposing and documenting business-related abuse and the complex dynamics of abuse facilitated through financing as well as developing strategies and incentives to establish the responsibility of economic actors.[72] They need to be equipped with the necessary tools and specialists to investigate business-related abuses and responsibilities.

22. Criminal prosecution of business actors whose actions violated criminal law is an essential facet of the justice component of reparation and the right of access to a remedy. They can be carried out through specifically established tribunals or the ordinary criminal justice system. In both cases, States need to guarantee effective investigations and prosecutions.

23. Criminal investigations and prosecutions in the aftermath of conflict should avoid a narrow focus on the responsibility of direct perpetrators of violence and extend to accomplices or co-perpetrators, including businesses if they played an important role in conflict-related crimes. Where special transitional justice tribunals are set up, they should have jurisdiction over all actors in the conflict.

24. Non-criminal judicial approaches, and effective civil litigation, can be useful measures to guarantee victims' rights and reverse the effects of the conflict that allowed certain businesses to benefit from serious human rights violations such as forced displacement. Ensuring effective civil litigation is particularly important to address the lack of corporate criminal responsibility in many settings. Nonetheless, it is important that these mechanisms do not replace the investigation and prosecution of crimes and instead complement and potentially facilitate criminal prosecutions.

25. The facilitation of effective civil litigation requires reducing the barriers human rights-related civil claims often face, such as statutes of limitation. The well-established obligation to eliminate criminal statutes of limitations for gross violations of international human rights law and serious violations of international humanitarian law should be matched by a commitment and clear steps aimed at eliminating civil statutes of limitations for such violations or abuses.

26. Even where States do not have ongoing arrangements for mutual legal assistance, home States should consider how they can better facilitate such cooperation when it is related to transitional justice and reparations efforts.

27. The issue of jurisdiction is also highly relevant for providing access to judicial remedy in cases of business-related human rights abuse. In conflict-afflicted areas where transnational corporations are involved, the "home" State has a role in assisting host States in ensuring that businesses are held to account for improper action. Lowering barriers for litigation to enable victims to bring cases seeking reparations in the business's home State could be an effective way to fulfil this role.

[72] IACHR, Business and Human Rights: Inter-American Standards. CIDH/REDESCA/INF.1/19 (Nov. 2019).

28. As recommended by the Working Group in its 2017 report, a series of factors should be guaranteed in negotiations leading to out-of-court settlements of civil litigation. Given the confidential nature of settlement negotiations and the frequently observed power imbalance between the parties, it is essential to ensure that affected persons and communities be provided with adequate and objective information about all aspects of the agreements. Moreover, confidentiality must not be used to prevent the flow of information within the community about the process and substance of the agreement. There is also some tension here between the objectives of reparation in transitional contexts and the practice within businesses. Out-of-court settlements that do not include proper acceptance of liability for corporate wrongdoing or require non-disclosure agreements do not meet the legal expectations of holistic reparation, but in practice some claimants and rights-holders may choose to pursue to address their claims in this way. States should reflect on whether allowing this to occur as a matter of domestic law is appropriate in light of their transitional justice commitments and needs.

29. States should combine different reparations mechanisms, such as administrative reparations programmes, funds for collective reparations projects and legal reform to guarantee that victims have practical and preferential access to courts. Their combined potential guarantees greater access to an effective remedy for victims and can outbalance the weaknesses of each of them if applied in isolation.

30. States must ensure that specially designed mechanisms exist for individual and collective reparations.

31. States must establish and businesses should support equitable, timely, independent, transparent, and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims.[73] Attempts at large-scale restitution need to be particularly mindful of customary and other informal HLP circumstances. They should cover not only property rights but all forms of land tenure. Particular attention should be paid to dealing adequately with secondary occupants. Land restitution programmes should also include measures to guarantee the right of refugees or internally displaced persons to a voluntary return to their former lands or places of habitual residence in safety and dignity.

32. Land restitution systems should be designed bearing in mind and addressing the power imbalances and lack of evidence that victims of land dispossession often face. They could, for example, apply lower standards of proof than national courts or even reverse the burden of proof to confront material and historical issues contributing to land dispossession and its related impunity gap.

33. Businesses should refrain from opposing land restitution claims by victims if they played a role in the land displacement, even if this role might not result in legal responsibility for the dispossession.

34. Where serious human rights violations or abuses occurred, redressing them through non-judicial grievance mechanisms would require that they are guided by international law standards and are equipped to provide a range of reparations measures.

35. If reparations are ordered by non-judicial grievance mechanisms in such cases, clear guidelines and procedures need to exist with regard to when and how to escalate these claims to other mechanisms, particularly, judicial mechanisms.

IV. Substantive Remediation Measures

36. Substantive reparation must be guided by the whole spectrum of reparation and not primarily focus on financial compensation. Each of the four pillars of transitional justice – truth, justice, reparation and guarantees of non-recurrence – represents a form of substantive

[73] E/CN.4/Sub.2/2005/17 Principles on housing and property restitution for refugees and displaced persons.

remediation and must be recognised as an inherent part of the remedy pillar of the UN Guiding Principles.[74]

37. Where they have incurred responsibility, businesses (where the domestic legal system allows) and business leaders should be included within the scope of judicial components of the transitional justice process. Clarity is needed on the applicable *mens rea*, *actus reus* and causation standards for each crime or civil wrong.

38. Businesses have the right to defend themselves against criminal prosecutions and civil litigation. However, the defence should avoid any revictimization of the victims and businesses should, in particular, desist from groundless counterclaims to intimidate victims. In the context of specifically established transitional justice tribunals, businesses should consider fully engaging and cooperating with these mechanisms to maximise the satisfaction of victims' rights, including the right to justice.

39. The right to truth is a necessary component of full reparations and businesses need to consider how they can help realise that aspect of the right to reparation. This includes participating actively and in good faith in the work of truth commissions to recognise their potential responsibilities for human rights violations or abuses, and violations they might have suffered themselves. It also requires businesses not to create unnecessary barriers to access to information related to past violations and abuses, and to proactively disclose information, including documents to truth commissions and victims.

40. As part of satisfaction, businesses should provide a formal acknowledgement of wrongdoing when they cause or contribute to violations or abuses of human rights. This can occur through a court judgment, a process of truth and reconciliation, formal apologies, acknowledgements in the media, memorialisation, and/or participation in culturally appropriate or culturally sensitive ceremonies.

41. Symbolic reparations, such as public apologies, memorialisation, and/or participation in culturally appropriate or culturally sensitive ceremonies, are highly contextual and should be carefully and appropriately developed by relevant stakeholders. Such processes are likely to hold the highest potential to realise their reparative potential when ownership (and control of resources allocated to these initiatives) is placed outside the control of the business actors (e.g., through the establishment of an independent, fully funded trust), and such programmes are controlled by victims or jointly controlled by relevant stakeholders.

42. Where compensation is provided, the amount of compensation needs to reflect the moral and material harm caused in order to provide adequate redress and have a sufficient deterrent effect to serve as a guarantee of non-recurrence.

43. Where businesses and communities agree upon material remedies such as constructing or handing over buildings (e.g., schools, hospitals, etc.), the business should provide a roadmap for their long-term use and financial sustainability. For example, handing over a dilapidated asset in need of significant renovation without providing a plan and resources for repair would not be an effective reparation.

44. Businesses need to facilitate victims' access to land and property restitution. Where restitution is not possible or not acceptable to victims, adequate compensation needs to be provided. Too often, substitute and inferior land offered to victims is insufficient for them to maintain their livelihoods. This is not an effective reparation and in a situation like this, additional compensation would be required.

45. Businesses should modify their policies to avoid non-repetition of the violations and abuses they caused or contributed to. This should include avoidance of future risks or negative business impact on communities.

46. Guarantees of non-recurrence need to prevent the repetition of violations and abuses of both civil and political rights, such as extrajudicial killings or forced disappearances, and socio-economic rights.

[74] A/75/212, at paras. 84-87.

47. Where a business has engaged in particularly egregious conduct, the only guarantee of non-recurrence may be dissolution or sale of the business or its prohibition from operating on the territory of the State. As part of their transitional justice measures, States should consider whether and when a business's involvement in past violations or abuses is so egregious that its ongoing participation in society undermines the State's commitment to non-recurrence of the past. Where dissolution, sale or exclusion is required, States must ensure that the process for this and its implementation complies with the rule of law.

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

V. Relationship between reparation and post-conflict reconstruction and development interventions, including the responsibility of other States

49. In the aftermath of authoritarian rule or armed conflict, States need to implement transitional justice measures as well as different types of reconstruction policies, including recovery and economic development policies, governance and rule of law reforms, and conflict prevention initiatives. Progress in all these areas is necessary to guarantee their population's needs, including victims of gross human rights violations and abuses.

50. States should avoid adopting new investment or trade agreements until they understand how their transitional justice processes will address and impact business responsibility. If they then pursue investment or trade agreements, these should be tailored to maximally protect the State's responses to transitional justice and its obligations to victims. In line with the UN Working Group's report on investment agreements, States should critically examine whether they need investor-State dispute settlement to achieve the goals of the agreement. Third-party States have a responsibility to avoid seeking or imposing investment and trade agreements that would undermine the implementation of transitional justice.

51. Post-conflict reconstruction, peacebuilding and development initiatives should not count as reparations programmes, unless they comply with the legal standards inherent in the right to remedy and reparation and are linked to and aimed at providing reparation to victims of human rights violations and abuses, rather than meeting the State's social and economic rights obligations that are generally owed.

52. Likewise, the participation of companies in these initiatives cannot be understood as a reparation *per se*, nor does it free businesses from their specific responsibilities regarding reparations derived from human rights abuses. While businesses might be reluctant to engage in reparations programmes and more inclined to engage in development projects, as this does not require recognition of responsibility, to count as a reparation, any benefit or service needs to be accompanied by an acknowledgement of responsibility, and it must be directly linked to truth, justice, and guarantees of non-recurrence. Therefore, business contributions to development or post-conflict reconstruction can only be considered reparation if this element is present.

53. Humanitarian aid programmes cannot be considered reparations. They should be designed to foster subsequent reparations process. For this to be possible, the approach of these programmes should, from the outset, acknowledge survivors as rights holders rather than beneficiaries.

54. Businesses must refrain from presenting their voluntary participation in reconstruction and development policies as compliance with reparations obligations and participation in transitional justice processes.

55. States should refrain from inducing businesses, for example, by creating economic or legal incentives, to participate in reconstruction policies that seek to evade, limit or delay their reparations obligations.

56. Reparations programmes must complement development efforts rather than duplicate them. Development efforts must also ensure business respect for human rights in accordance with the UN Guiding Principles.

57. Even though it is important to maintain and recognise the separate nature of reparation of the harm suffered by victims and development and post-conflict reconstruction, these interventions should be aligned to the greatest extent possible. Therefore, reparations mechanisms should favour measures that produce positive spillover effects for development and development interventions should maximise their reparatory potential. Alignment is also important because the transformative capacity of reparations mechanisms is strengthened when they are complemented by reparation-centric development and peacekeeping policies. It helps to avoid development and post-conflict reconstruction policies causing revictimization or even fuelling further conflict. To remove access barriers, reparation usually needs to be preceded by a series of emergency humanitarian and basic social assistance efforts.

58. Both development interventions and reparations mechanisms need to put rights holders at the centre to understand the nature of the harm which requires reparation and the potential negative impacts from new business activity during reconstruction. In all cases, rights holders must be consulted and engaged from the outset.

59. It needs to be borne in mind that development interventions do not automatically have positive effects on victims, as economic growth often does not improve the lives of victims. They might even sometimes adversely affect the interests of victims of communities. Particularly in post-conflict settings, collective reparation and development interventions should be considered with a local reconstruction lens in close consultation with victims. Businesses engaging in private sector investment, trade and other economic activity should use heightened human rights due diligence in order to understand how the conflict context may lead to different kinds of adverse human rights impacts.

60. The reparatory dimension of development and post-conflict reconstruction interventions could be based on the concepts of restorative or transformative justice. Its operationalisation would benefit from collaboration between national, sub-national or local State institutions, businesses, and, where appropriate, civil society organizations. These collaborations should be guided by principles such as: *i) synergy:* that businesses intervene according to their expertise and business purpose; *ii) scale:* to enable large scale interventions instead of isolated contributions; *iii) monitoring:* to measure the impact and success of the intervention with victim participation; *iv) context:* the political context is crucial for stimulating and incentivising business participation in these interventions.

61. It needs to be determined in close consultation with victims to what extent businesses that were or were seen to be involved in human rights violations or abuses should become actors of peacebuilding and development without also engaging with accountability mechanisms, such as truth commissions, trials and reparation. Such consultation needs to be based on the principle of meaningful participation, which can in itself have reparatory effects.

62. There is ample room for States and businesses to join efforts to link social and development policies and reparations programmes. Public-private partnerships might be useful to advance these goals, as the private sector can make critical contributions to these initiatives' early and long-term success. In addition, there is no shortage of voluntary business-led initiatives supporting these policies, and various States have put in place fiscal and other types of incentives to encourage businesses to join their reconstruction efforts. These initiatives must not be confused with or replace reparation.

63. Focusing CSR measures on initiatives that prepare the ground for reparations can avoid confusion between actions arising from accountability processes and those of a purely voluntary nature. States and businesses should always make clear to affected communities and victims that these are voluntary initiatives that complement reparation.