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ATROCITIES WITH A POSITIVE ACCOUNT BALANCE? INCLUDING MEASURES TO RECAPTURE CORPORATE PROFITS DERIVED FROM GROSS HUMAN RIGHTS VIOLATIONS IN REPARATION PROGRAMMES UNDER THE INTERNATIONAL LEGAL FRAMEWORK OF STATE RESPONSIBILITY

¿ATROCIDADES CON SALDO POSITIVO? EL RÉGIMEN GENERAL DE RESPONSABILIDAD POR HECHOS INTERNACIONALMENTE ILÍCITOS COMO FUNDAMENTO PARA LA INCLUSIÓN EN PROGRAMAS ESTATALES DE REPARACIÓN DE MEDIDAS PARA RECUPERAR LOS BENEFICIOS EMPRESARIALES DERIVADOS DE LA VIOLACIÓN DE DERECHOS HUMANOS

ATROCIDADES COM EQUILÍBRIO POSITIVO? O REGIME GERAL DE RESPONSABILIDADE POR ATOS INTERNACIONALMENTE ILÍCITOS COMO BASE PARA A INCLUSÃO EM PROGRAMAS ESTADUAIS DE REPARAÇÃO DE MEDIDAS PARA RECUPERAR OS LUCROS DE NEGÓCIOS DECORRENTES DA VIOLAÇÃO DE DIREITOS HUMANOS

Recebido em:	21/02/2022
Aprovado em:	30/05/2022

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ABSTRACT

Although steps are being made to make companies participate in the redress of the human rights violations they have committed, at the current level of development of international law the obligation to make reparation continues to reside with the States. Indeed, certain

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Revista | Direitos Sociais e Políticas Públicas Unifafibe

legal norms and principles in the general regime of responsibility of the State for internationally wrongful acts would justify – or even require – the adoption of measures to restore the profits obtained by companies as a result of their involvement in the commission of serious violations of human rights. The implementation of such 'profit recapture measures' could be better done through large-scale administrative reparation programmes that give effect to the State obligation to redress victims.

Keywords: reparation; state responsibility; internationally wrongful acts; human rights; business actors.

RESUMEN

Aunque se están dando pasos para que las empresas participen en la reparación de las violaciones de derechos humanos que han cometido, en el actual grado de desarrollo del derecho internacional la obligación de reparar sigue correspondiendo a los Estados. De hecho, ciertas normas y principios jurídicos del régimen general de responsabilidad del Estado por hechos internacionalmente ilícitos justificarían -o incluso exigirían- la adopción de medidas para recuperar los beneficios obtenidos por las empresas como consecuencia de su participación en la comisión de graves violaciones de derechos humanos. La implementación de tales medidas de reversión de ganancias podría realizarse de una mejor manera a través de programas administrativos de reparación a gran escala que hagan efectiva la obligación del Estado de reparar a las víctimas.

Palabras clave: reparación; responsabilidad del estado; hechos internacionalmente ilícitos; derechos humanos; empresas.

RESUMO

Embora estejam sendo tomadas medidas para que as empresas participem da reparação das violações de direitos humanos que cometeram, no atual nível de desenvolvimento do direito internacional, a obrigação de reparar continua a corresponder aos Estados. De fato, certas regras e princípios jurídicos do regime geral de responsabilidade do Estado por atos internacionalmente ilícitos justificariam – ou mesmo exigiriam – a adoção de medidas para

Revista | Direitos Sociais e Políticas Públicas Unifafibe

recuperar os lucros obtidos pelas empresas em decorrência de sua participação no cometimento de graves violações de direitos humanos. violações. humanos. A implementação de tais medidas de reversão de lucros poderia ser melhor feita por meio de programas de reparação administrativa em grande escala que tornem efetiva a obrigação do Estado de reparar as vítimas.

Palavras-chave: reparo; responsabilidade do Estado; atos internacionalmente ilícitos; direitos humanos; negócio.

INTRODUCTION: REDRESSING CORPORATE ATROCITIES IN TRANSITIONAL JUSTICE CONTEXTS

Companies know full well that there is good fishing to be had in troubled waters. Many grow rich in situations of armed conflict and/or dictatorial rule because of their involvement (direct or indirect) in the commission of gross human rights violations.[1] However, once the conflict is over or the transition to democracy has been initiated, rarely do they have to answer for their involvement. Atrocities thus become an unacceptable source of corporate profits.

Processes of transitional justice and post-conflict scenarios[2] are an opportunity to address gross violations of human rights committed by companies. On the one hand, there is a growing consensus that these processes should have the effect of transforming socio-economic relationships, so that the causes of conflicts and breaches of human rights might be addressed and resolved.[3] On the other hand, they entail the implementation of

[1] See, for example, Stefano Manacorda, 'Towards an Anti-Bribery Compliance Model: Methods and Strategies for a "Hybrid Normativity"' in Stefano Manacorda, Francesco Centone and Gabrio Forti (eds), *Preventing Corporate Corruption. The Anti-Bribery Compliance Model* (Springer 2014) 16-17; Leigh A Payne and Gabriel Pereira, 'Corporate complicity in international human rights violations' (2016) 12 Annu Rev Law Soc Sci. 63, 64-66.

[2] On the interlinkage between transitional justice and peacebuilding, see Catherine Baker and Jelena Obradovic-Wochnik, 'Mapping the Nexus of Transitional Justice and Peacebuilding' (2016) 10 J Interv Statebuilding 281.

[3] See, for example, Louise Arbour, 'Economic and social justice for societies in transition' (2007) 40 JILP 1, 26-27; United Nations High Commissioner for Human Rights (UNHCHR) 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General: Analytical study on human rights and transitional justice' (6 August 2009) UN Doc

Revista | Direitos Sociais e Políticas Públicas Unifafibe

mechanisms aimed at combatting impunity for gross violations of human rights and/or international humanitarian law.[4] When acting against companies for gross human rights violations in transitional contexts, the path usually employed is judicial proceedings, initiated by the victims themselves. However, the judicial systems of the affected countries often happen to be dysfunctional,[5] and victims must resort to transnational litigation to get corporate redress[6]. The role of companies in gross human rights violations has also been addressed by a number of truth commissions, and constitutes the subject of various recommendations in their final reports.[7] Nevertheless, as Sandoval, Filippini and Vidal point out, 'this does not mean that they are functionally able to redress the role and

A/HRC/12/18 para 3; Gaby Oré Aguilar and Felipe Gómez Isa (eds), *Rethinking Transitions. Equality and Social Justice in Societies Emerging from Conflict* (Intersentia 2011); Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practitioners' (2014) 8 IJTJ 339; Francesca Capone, 'A Reflection on the Transformative Potential of Reparations. The Approach of the Regional Human Rights Courts' (2018) 12 HR&ILD 190. This perspective, however, is not exempt from criticism. Padraig McAuliffe considers that 'critical transitional justice theorists have failed to make visible the political framework within which their aspirations for transformation are to be realized, to say nothing of the manner in which this framework sets opposition in motion to radical reform of economic structures.' Padraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing 2017) 289. See also Kora Andrieu, 'Dealing with a "New" Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?'(2012) 11 J Hum Rts 537, 553-54; Margaret Urban Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 IJTJ 108. An intermediate stance is defended by Moffett, who suggests that the transformative potential should lie in guarantees of non-recurrence, rather than in reparation. Luke Moffett, 'Reparations in Transitional Justice: Justice or Political Compromise?' (2017) 11 HR&ILD 59.

[4] See UNCHR 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity' (2005) UN Doc E/CN.4/2005/102/Add.1.

[5] Philipp Wesche, 'Business actors and land restitution in the Colombian transition from armed conflict' (2021) 25 Intl J Hum Rts 295, 295.

[6] Most of the proceedings against business actors for extra-territorial human rights violations are civil, although the criminal path is also been explored in some States, such as The Netherlands (e.g., the complaint against Lima Holding B V, Riwal's parent company, for involvement in war crimes, given its participation in the construction of the wall on occupied Palestinian territory – dismissed in 2013); Switzerland (e.g., complaints against Argor-Heraeus SA, for abetting the war in Democratic Republic of Congo through money laundering - case closed in 2015 -, or Nestlé, for its involvement in the murder of Colombian trade unionist Luciano Romero – dismissal confirmed in 2014), or France (e.g., complainst against Amesys – charged in June 2021 with complicity in acts of torture in Lybia; Qosmos, for complicity in human rights abuses by the Syrian government by providing it with surveillance technologies; or Lafarge, for complicity in crimes against humanity in Syria's civil war – dismissal decision overturned in September 2021 by the Court of Cassation).

[7] See Leigh A. Payne, 'Truth commissions and corporate complicity' in Joris van de Sandt and Marianne Moor (eds), *Peace, Everybody's Business! A Comparative Analysis of Corporate Accountability in Transitional Justice: Lessons for Colombia* (Pax 2017).

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responsibility of corporations, or that the ones that have done so to date have been successful,' given their political weakness.[8]

Research on transitional justice mechanisms and business actors has paid less attention to corporate participation in reparation[9] until recent times.[10] Works in this field basically address victims' right to a remedy. To seek reparation for gross human rights violations involving business actors, victims essentially have three options.[11] The first, as noted above, would be to enforce reparations through the domestic courts of individual States – when their domestic laws so permit. The second would involve extending international responsibility to companies, a debatable option[12] as it would require the consensus of the States, which is some way far from being achieved. In the absence of specific mechanisms under public international law that allow to demand reparations directly from companies, the third option would be to involve companies in the reparation programmes drawn up by the countries affected, therefore leaving the decision to take general measures to correct the harm these corporations have caused with their behaviour in the hands of the State. However, in transitional justice contexts, the measures taken within reparation programmes seldom target companies and rarely aim at the recapture of corporate profits, exception made of some land restitution programmes.[13]

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[8] Clara Sandoval, Leonardo Filippini and Roberto Vidal, 'Linking Transitional Justice and Corporate Accountability' in Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013), 18.

[9] Although reparation would be indeed the classic way in international law to 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.' *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 47.

[10] See, for example, Clara Sandoval and Gill Surfleet, 'Corporations and Redress in Transitional Justice Processes,' in Michalowski (n 8); Tara L Van Ho, 'Is it Already Too Late for Colombia's Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives' (2016) 5 Intl Hum Rts L Rev 60; Moffett (n **Erro! Indicador não definido.**); Irene Pietropaoli, 'Remedy for corporate human rights abuses in transitional justice contexts' (PhD thesis, Middlesex University 2017) <https://eprints.mdx.ac.uk/24310/1/IPietropaoli%20thesis.pdf> accessed 23 October 2021; Wesche (n 5).

[11] Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, 'The Right to Reparation for Victims of Gross and Systematic Human Rights Violations,' in K De Feyter, S Parmentier, M Bossuyt and P Lemmens (eds), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 486 para. 201-02.

[12] See Nien-he Hsieh, 'Should Business Have Human Rights Obligations?' (2015) 14 J Hum Rts 218.

[13] Such as the ambitious one set out in Colombia. See Van Ho (n 10); Wesche (n 5). On land restitution within administrative reparation programmes see Pietropaoli (n 10) 184-201.

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The analysis we propose undertaking here focuses precisely on State reparation programmes. Here we argue that such programmes would be hypothetically adequate for making companies participate in the redress of the gross human rights violations they have committed. As things currently stand, international law places the duty to repair on States. However, the prevailing approach to victims' right to a remedy in the transitional justice field is leaving aside the analysis of other potential measures that States could adopt to address such violations in the context of reparations. We contend that certain legal norms and principles in the general regime of responsibility of the State for internationally wrongful acts would theoretically justify the adoption of what might be call 'profit recapture measures,' namely measures of an expropriatory nature against and/or the imposition of payments on business enterprises by way of restoring the profits obtained as a consequence of their involvement in the commission of gross human rights violations. In defence of this position, we begin by recalling the scope of the obligation of States to make reparation in the light both of the Articles on State responsibility for internationally wrongful acts ('ARSIWA') adopted by the United Nations International Law Commission ('ILC') in 2001[14] (Section 2). We then analyse the extent to which this obligation might be extendable to companies considering the provisions of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[15] ('Principles on Reparation') (Section 3) and the works on the topic at the UN Commission on Human Rights ('UNCHR') and the UN Human Rights Council ('UNHRC') (Section 4). This allows us to demonstrate that – beyond the potential liability of companies – the obligation to make reparation continues to reside, today, with the State. On this basis, we proceed to identify the rules of the general regime of State responsibility that justify that the State adopts profit recapture measures against companies (Section 5). We complete our analysis by reflecting on what specific conclusions can be drawn (Section 6).

[14] UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83 Annex.

[15] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147.

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1 THE STATE'S DUTY TO REPAIR AND VICTIMS' RIGHT TO REPARATION AS A RESULT OF GROSS HUMAN RIGHTS VIOLATIONS

In addressing the obligation to redress serious human rights violations, we need to begin by recalling that, in accordance with the ILC ARSIWA, when a State commits an internationally wrongful act (that is, it breaches an international obligation and that violation is attributable to it under international law), it incurs a triple obligation: to cease that act,[16] to offer appropriate assurances and guarantees of non-repetition (if the circumstances so require[17]), and to 'make full reparation for the injury caused by the internationally wrongful act.'[18]

Seen in this light, reparation therefore implies the emergence of a new legal relationship between the State responsible for the commission of an internationally wrongful act and the injured State, owner of the right to reparation. Such reparation can take three forms that might occur singly or in combination: restitution (re-establishment of the situation prior to the commission of the internationally wrongful act), compensation (financially assessable damage, including loss of profits[19]) and satisfaction (moral reparation).[20] According to the ILC, 'assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.'[21]

The introduction into international human rights law of the basic ideas sketched out in relation to the States' obligation to make reparation in the framework of general international law raises a number of specific issues that merit attention. To begin with, it should be borne in mind that international human rights law constitutes its own normative

[16] Art 30 a) ARSIWA.
[17] Art 30 b) ARSIWA.
[18] Art 31.1 ARSIWA. Such injury includes 'any damage, whether material or moral, caused by the internationally wrongful act of a State' (art 31.2 ARSIWA).
[19] Including the payment of interests 'on any principal sum due under this chapter … when necessary in order to ensure full reparation' (art 38 ARSIWA) but excluding interest on the profit earning-capital over the same period of time. ILC, 'Responsibility of States for Internationally Wrongful Acts' [2001] II 2 YbILC 105 [33] (Commentary to Draft Article 36).
[20] Art 34 ARSIWA.
[21] ILC (n 19) 106 [5] (Commentary to Draft Article 37).

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order within international law, composed of primary and secondary norms. Among these we find the issue of the reparation of victims of serious human rights violations. Yet, we should not ignore the fact that the legal obligations established under the norms of international human rights law are not bilateral but have an *erga omnes* character. This absence of bilaterality in the obligations is explained in turn by the fact that the beneficiaries of the obligations contained in these norms are not other States, but the individuals whose rights are recognized. Consequently, in case of non-compliance with these provisions, the damage that might result will fall on individuals, rather than on States. To some degree, this alters the logic of reparations in general international law, considered primarily in relation to the injured State, by introducing the figure of the victims of human rights violations. Moreover, international human rights law is associated with other normative orders in which dispositive and peremptory norms exist side by side, what can give rise to different regimes of responsibility depending on the norm that has been breached. This is particularly the case of international humanitarian law and international criminal law. Ultimately, the existence of norms in these orders oriented to the protection of human dignity[22] justifies taking into account the interrelations between them and international human rights law.

Under international human rights law, the possibility that individuals might obtain redress as a consequence of injury derived from the violation of their rights is articulated through the recognition of their right to an effective remedy.[23] From this derives not only

[22] Without this implying that all the norms of international humanitarian law and/or international criminal law have that objective.

[23] See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 2.3; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 13; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 25; revised Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) English translation in UN Doc CHR/NONE/2004/40/Rev.1 art 12- including the right to seek judicial remedy, though it does not require that it be effective; art 8 also expressly states that each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation. On the contrary, it is not included in the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217. The right of victims to a remedy appears in other human rights instruments, including the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) art 8; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 6; Convention Against Torture and Other Cruel,

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the procedural nature of the right of access to justice, but also the substantive right to reparation.[24] In this regard, the UN Human Rights Committee ('UN HRC') noted in 2004 that:

> Article 2, paragraph 3 [of the International Covenant on Civil and Political Rights], requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.[25]

This approach is the one followed also by the 2005 Principles on Reparation. This instrument, based on the ILC ARSIWA,[26] systematizes the rights already recognized by the

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Inhuman or Degrading Treatment of Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 art 14; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 39; International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 art 8. It also appears in instruments of international humanitarian law, including The Hague Convention (IV) respecting the laws and customs of war on land (Second International Peace Conference, adopted 18 October 1907, entered into force 26 January 1910) art 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 art 91. In relation to the reparation of victims, see also Rome Statute of the International Criminal Court ('ICC') (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 75.

[24] Dinah Shelton, 'The United Nations Principles and Guidelines on Reparations: Context and Contents' in De Feyter et al (n 11) 13.

[25] UN HRC 'General Comment No 31' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 16.

[26] Theo Van Boven, 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (United Nations Audiovisual Library of International Law, United Nations 2010) 1-2 <http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf> accessed 23 October 2021.

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international community.[27] According to Principle 11, victims' right to remedies for gross violations of international human rights law and serious violations of international humanitarian law can be understood as constituting three rights: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Reparation is subject to further development in Principles 15 to 23, to the effect that reparation must be adequate, effective, prompt and proportional to the gravity of the violations and the harm suffered.[28] Specifically, reparation can take five forms[29] – restitution,[30] compensation,[31] rehabilitation,[32] satisfaction,[33] and guarantees of non-repetition.[34]

2 THE OBLIGATION TO PROVIDE REPARATION IN THE PRINCIPLES ON REPARATION: OPENING UP A WAY FOR CORPORATE REPARATION?

The Principles on Reparation raise a question of particular interest for our discussion here, namely, who exactly should be expected to make reparation. In fact, the literal interpretation of Principles 15 and 16 seems to open up a way for reparation to be sought directly from companies that have committed human rights violations. When referring to

[27] UNHRC 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (14 October 2014) UN Doc A/69/518 para 18. It must be pointed out that the resolution was adopted by consensus.

[28] Principle 15.

[29] Principle 18. See also UN Doc A/69/518 (n 27) para 17.

[30] Restitution (Principle 19) should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.

[31] Compensation (Principle 20) should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law.

[32] Rehabilitation (Principle 21) should include medical and psychological care as well as legal and social services.

[33] Satisfaction (Principle 22) is a form of moral reparation (such as public apology, including acknowledgement of the facts and acceptance of responsibility, commemorations and tributes to the victims, etc.).

[34] Guarantees of non-repetition (Principle 23) are structural measures that seek prevention (e.g., reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law).

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the actors deemed liable for reparation, the Principles on Reparation contemplate two scenarios. On the one hand, adhering to the general regime of responsibility, Principle 15 places the duty of reparation on the States when it establishes that 'a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law'. But, at the same time, in the same Principle, the possibility is foreseen that this obligation also falls on non-state actors: 'In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.' Notwithstanding this, the duty to repair would continue to reside with the States, given that, in addition, Principle 16 provides that these 'should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.'

The drafting process reveals that Principle 15, designed to avoid the impunity of non-state actors,[35] mainly intended to encompass insurrectional or other movements in the words of Article 10 ARSIWA.[36] However, nothing in the wording of Principles 15 and 16 would exclude the possibility to include other non-state actors, such as companies, within their scope,[37] although not without problems, as the Principles on Reparation leave unresolved the relationship between the responsibility of the State and a potential

[35] Van Boven (n 26) 3. See also 'Report of the second consultative meeting on the Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (Geneva, 20, 21 and 23 October 2003)' in UNCHR 'The right to a remedy and reparation for victims of violations of international human rights and humanitarian law. Note by the High Commissioner for Human Rights' (10 November 2003) UN Doc E/CN.4/2004/57 28 (explanatory comment 4). Sandoval and Surfleet argue that Principle 15 'recognizes the obligation of entities other than states to provide reparations for victims of violations' and support their claim by referring to the provisions of the right to reparations under the Rome Statute. Sandoval and Surfleet (n 10) 96.

[36] See UN Doc E/CN.4/2004/57 (n 35) 27 (explanatory comment 4). The report specifically focuses on 'groups referred to as non-State actors [that] have transformed themselves into the Governments of States by assuming power' and 'groups that assume effective control over certain territory and exercise over that territory and the people on that territory the equivalent control exercised by States'. No other non-state actors are mentioned.

[37] Ellen Desmet, 'The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation: A Landmark or Window-Dressing: An Analysis with Special Attention to the Situation of Indigenous Peoples' (2008) 24 South African Journal on Human Rights 71, 81.

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corporate responsibility. In the current state of public international law, the international obligation to make reparation would only arise directly for persons in the context of criminal proceedings for the commission of crimes under international law, since the determination of individual responsibility in such cases generally entails not only a penalty for the perpetrator, but also the obligation to make reparation to the victims.[38] Nevertheless, the formulation of the Principles on Reparation in relation to the obligation of non-state actors to make reparation is sufficiently ambiguous to cover other cases, unrelated to the determination of criminal responsibility under international law, which could give rise to that obligation. Indeed, despite the limits of international law, there is a growing domestic practice of judicial decisions – mainly in civil proceedings – imposing corporate reparation for human rights violations – usually compensation, although hypothetically companies could repair in any other form.

Additionally, the wording used in Principle 16, foreseeing State reparation when 'the parties liable for the harm suffered' are unable or even unwilling to meet their obligations makes the provision regarding non-state actors problematic when applied to individuals and companies, as State intervention in these cases would seem to be of a subsidiary nature. Moreover, this principle seems to envisage State reparation in this context as an optional measure, insofar it points out that the State 'should endeavour' to establish national reparation programmes. While these provisions may be appropriate when dealing with the responsibility of non-state actors in Article 10 ARSIWA,[39] the same cannot be said regarding private actors. In accordance with the general rules of State responsibility for

[38] Without wishing to examine this question in any great depth here, as it lies outside the scope of the present analysis, we should point out the difficulty of reconciling the criminal responsibility of companies in the current system of international criminal justice – understood as that system integrated by the domestic courts as primary jurisdictions over the core international crimes and the ICC as a complementary jurisdiction and the keystone to such system. Not all States include in their legal systems the criminal responsibility of legal persons for gross violations of human rights, neither does the Rome Statute of the ICC, which, consequently, cannot exercise its complementary jurisdiction in the case of crimes directly attributable to companies. On reparations in international criminal law see, for example, Emanuela-Chiara Gillard, 'Reparation for violations of international humanitarian law' (2003) 85 *IRRC* 529, 545-548; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 86-124.

[39] On the complexities surrounding responsibility of armed non-state actors, including reparations, see Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2020).

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internationally wrongful acts, although in principle the conduct of individuals and other private actors is not attributable to the State, State responsibility may arise if it did not adopt the necessary measures to prevent the effects of the conduct of individuals when under the obligation to do so.[40] In this regard, international human rights law imposes three major obligations on States: to respect, promote and guarantee human rights. The latter implies that States have a duty to avoid interference by third parties in the enjoyment of these rights.[41] Therefore, State failure to prevent human rights violations committed by private persons constitutes a violation of an international legal obligation that is directly required of it.

Thus, the interpretation that the Principles on Reparation encompass a 'privatizing' approach, based on the subsidiarity of State responsibility, should be criticized, as it is hardly tenable. On the one hand, when there have been gross human rights violations, rarely will the State not have incurred international responsibility, be it by action (assisting in the commission of the violation) or by omission of its duty of vigilance to prevent such acts from occurring. Hence, it does not seem appropriate to accept the subsidiary nature of State responsibility, but rather it should be considered at least in terms of complementary obligations, when appropriate. At most, this subsidiarity will only be admissible once the corresponding administrative or judicial channels have been activated to demand the liability of individuals or legal persons for their conduct and it can be shown that they cannot repair the harm suffered[42] (and not only that they are unwilling to repair the harm, as Principle 16 seems to allow for). On the other hand, as Evans warns, '[t]here are inherent dangers in shifting responsibility from states towards individuals, as this may ultimately leave victims without redress.'[43]

[40] See ILC (n 19) 38 [4] (Commentary to Chapter II).

[41] Here, the UN HRC has indicated that 'the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.' UNHRC (n 25) para 8.

[42] See in this regard Principle on Reparation 17.

[43] Evans (n 38) 86.

Revista | Direitos Sociais e Políticas Públicas Unifafibe

3 STATE REPARATION AND CORPORATE REDRESS WITHIN THE FRAMEWORK OF THE UN COMMISSION ON HUMAN RIGHTS AND THE UN HUMAN RIGHTS COUNCIL

As indicated above, the literal interpretation of Principles on Reparation 15 and 16 suggests the possibility of demanding redress directly from companies. This is in line with the work that has been going on for almost two decades within successive intergovernmental human rights bodies at the UN on the question of corporate accountability for human rights violations.[44] However, while steps have been taken to affirm corporate duty to redress, an overview of the works on the topic leads to conclude that the duty to repair still lies with the State.

Among relevant documents, note should be taken first of all of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ('Norms'), prepared by the Sub-Commission for the Protection and Promotion of Human Rights in 2003, which indicated that:

> Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law. [45]

Therefore, the Norms clearly backed a corporate duty to repair, which should be established at court. Nevertheless, they did not exclude State reparation. On the contrary,

[44] See other precedents established outside these bodies in David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 AJIL 901, 902-03.

[45] UNCHR Sub-Commission 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2 para 18.

Revista | Direitos Sociais e Políticas Públicas Unifafibe

they stated that '[n]othing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law,'[46] thus relating State reparation to corporate reparation in a complementary, rather than subsidiary, way. In any event, these Norms, the first 'nonvoluntary initiative accepted at the international level,'[47] were not adopted by the UNCHR, which confirmed the importance and priority of the matter, but considered that the document had no 'legal standing.'[48]

A step forward in the direction of holding companies responsible for human rights violations was taken with the Guiding Principles on business and human rights ('Guiding Principles').[49] These principles are structured around three pillars (protect, respect and remedy), with Guiding Principles 22 to 31 addressing remediation and access to remediation mechanisms. The basic premise is that business enterprises must repair or contribute to reparation if they 'identify that they have caused or contributed to adverse impacts.'[50] However, this duty is more of a moral than a legal obligation. In fact, it has been pointed out that the major weakness of the Guiding Principles is that 'they do not create new international legal obligations for companies that can be enforced, and are not accompanied by a grievance or complaints mechanism that victims of business-related human rights abuses can access for remedy do not impose international legal obligations on companies.'[51] Instead, the obligation to repair falls essentially on the State, be it via judicial or extrajudicial channels. Reference is made though to non-state-based grievance

[46] ibid para. 19.

[47] Weissbrodt and Kruger (n 44) 903.

[48] UNCHR 'Responsibilities of transnational corporations and related business enterprises with regard to human rights' (20 April 2004) UN Doc E/CN.4/DEC/2004/116.

[49] UNHRC 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31.

[50] ibid 20 (Guiding Principle 22).

[51] Mariëtte van Huijstee, Victor Ricco and Laura Ceresna-Chaturvedi, *How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy. A guide for civil society organisations* (SOMO/CEDHA/Cividep India 2012) 12 <https://corporatejustice.org/how-to-use-the-un-guiding-principles-on-business-and-human-rights-in-company-research-and-advocacy.pdf> accessed 23 October 2021.

Revista | Direitos Sociais e Políticas Públicas Unifafibe

mechanisms,[52] and, where appropriate, international human rights bodies.[53] Nevertheless, this does not imply that international law provides a way to require companies to repair: it is the States who have the duty to provide access to remedy to victims of human rights abuses, since they are the ones that 'should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.'[54]

In this sense, the obligation to implement the first set of mechanisms would continue to depend on whether it is thus established by the State in whose territory the companies operate (or, alternatively, in their State of origin). In the absence of State regulations, here not just the possibility of their being used but also their mere existence is dependent on the goodwill of the company, however much the Guiding Principles assert that 'business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted,'[55] so that individuals can 'engage the business enterprise directly in assessing the issues and seeking remediation of any harm.'[56] Regarding the second group of mechanisms, given the nature of international human rights bodies, recourse to them can only serve to determine the State's responsibility for breach of its obligation to protect against third-party interference in the enjoyment of human rights, but not the company's.[57]

On the matter of reparation, mention should also be made of the report on this issue presented in 2017 by the Working Group on the issue of human rights and transnational corporations and other companies (WG).[58] It adheres to the approach taken by international human rights law (i.e., the right to an effective remedy following a right's violation) and explores the role that States, companies and rights-holders should have in

[52] Guiding Principles 28 to 30.
[53] UN Doc A/HRC/17/31 (n 49) 24 (Commentary to Guiding Principle 28).
[54] Guiding Principle 28.
[55] ibid 25 (Guiding Principle 29). See also Guiding Principle 30.
[56] ibid (Commentary to Guiding Principle 29).
[57] In fact, Ruggie admits that, when these mechanisms have dealt with human rights violations by companies, it has been in the context of cases of non-compliance with the State's obligation to protect. ibid (commentary to Guiding Principle 28).
[58] UNHRC 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (18 July 2017) UN Doc A/72/162 ('WG Report').

Revista | Direitos Sociais e Políticas Públicas Unifafibe

such processes of reparation. While the WG assumes that States are the only ones with international legal obligations to guarantee access to an effective remedy,[59] it also adopts the idea contained in the Guiding Principles that the right to reparation entails responsibility for companies, stating that '[t]o realize the right to an effective remedy, access to appropriate remedial mechanisms should be provided by the bearers of a duty or responsibility concerning this right.'[60] However, it goes on to say that States are the ones who 'should … ensure that they put in place effective remedial mechanisms that can deliver effective remedies.'[61] In contrast, no matter how much the WG reiterates the role to be played by business enterprises in realising effective remedies, all that can be expected of them is that they 'provide for' a remedy. [62]

The WG understands that a 'bouquet of remedies' should simultaneously be made available to those affected.[63] Moreover, an effective remedy should satisfy three interrelated purposes: namely, prevention, compensation and deterrence.[64] Returning to the commentary to Guiding Principle 25, it notes that remedies may include 'apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.'[65] However, later it bases its approach to the matter on the five types included in the Principles on Reparation, analysing them in relation to business enterprises,[66] to which it adds 'other preventive remedies,' without making it clear, from the examples offered, how the reparative nature of a measure might be combined with its preventive nature.[67]

[59] ibid paras 14, 61.
[60] ibid para 14.
[61] ibid para 15.
[62] See ibid paras 65–71.
[63] ibid para 38.
[64] ibid para 40.
[65] ibid para 39.
[66] ibid paras 42–53.
[67] ibid para 54. The two do not a priori seem to be incompatible, but the examples provided (an injunction if there is prima facie evidence of possible damages or the possibility of seeking an order requiring a business enterprise to conduct a meaningful consultation with the affected community or conduct proper human rights due diligence) do not adequately demonstrate their interrelation and, more specifically, they do not make clear the reparative nature of these measures.

Revista | Direitos Sociais e Políticas Públicas Unifafibe

Finally, the Third Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises[68] focuses once again on States' duties, what has raised some criticism from a number of delegations.[69] Article 4.2.c affirms the right of victims to 'access to justice, individual or collective reparation and effective remedy,' although it creates some confusion when it includes among effective remedies 'restitution, compensation, rehabilitation, *reparation*, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration' (emphasis added). Nothing in the background documentation allows to understand why reparation as such is mentioned both as a right and as a specific remedy within a list that encompasses traditional forms of reparation together with more innovative remedies. Regarding the duty to repair, while reparation by companies is mainly channelled through domestic courts and non-judicial mechanisms accessible to victims, Article 8.4 prescribes the States' obligation to provide for 'reparations to the victims of human rights abuses in the context of business activities, including those of transnational character, in line with applicable international standards for reparations to the victims of human rights violations.' This indicates a top-down approach to reparations, rather than a bottom-up perspective that would make reparation depend on victims' initiative to introduce a claim against the company. Interestingly enough, the article goes on to state:

[68] UN Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights 'Third Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (17 August 2021) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> accessed 23 October 2021.

[69] See, for example, the general statement by Argentina on potential duplication of norms in UNGA 'Report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights' (14 January 2021) UN Doc A/HRC/46/73 Annex, 3; Brasil (on avoiding 'putting excessive burden upon states') in ibid 5 [9]; the African Group ('the draft should stick to the regulation of the activities of TNC's and OBE's, with respect to human rights, instead of placing many obligations to states …. Ultimately, the draft should seek to fill the existing gap in the international law in regards to the human rights abuses and violations by TNC's and provide reparations and remedies to the victims') in ibid 6; Chile (asking for a realistic proposal in terms of standards and commitments for States, as well as attention to its challenges to domestic law) in ibid 7 [7].

Revista | Direitos Sociais e Políticas Públicas Unifafibe

> Where a legal or natural person conducting business activities is found liable for reparation to a victim of a human rights abuse, such person shall provide reparation to the victim or compensate the State, if that State has already provided reparation to the victim for the human rights abuse resulting from acts or omissions for which that legal or natural person conducting business activities is responsible.

Therefore, in contrast to the Principles on Reparation, States' duty to repair is no longer envisaged as subsidiary, but rather as principal, or at least pre-eminent – if the duty to repair is considered to be somehow concurrent – to guarantee victims' right to reparation.

4 JUSTIFYING PROFIT RECAPTURE MEASURES IN ADMINISTRATIVE PROGRAMMES OF REPARATION IN THE LIGHT OF THE GENERAL REGIME OF STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS

In view of the preceding analysis, it becomes clear that international law as it stands today does not extend the duty to repair to companies be it in response to a general breach of human rights or to a specific gross human rights violation. Instead, States are the ones internationally legally obliged to adopt measures to provide a reparation. As we have stressed, the most appropriate would be to establish large-scale administrative programmes, including measures aimed at obliging business enterprises to return the profits obtained through the commission of human rights violations, as victims' reparation is not conditioned by the workings of the judicial process – typically slower and both more restrictive and burdensome.[70]

Obviously, the approach proposed is not without its problems. For example, while it might be relatively straightforward to determine the profit made and the best way to restore this when the company has appropriated land or other assets, it is not so easy to quantify the profits when they result from human rights violations with no obvious patrimonial nature (e.g., murder, torture or enforced disappearances). Additionally, it

[70] UN Doc A/69/518 (n 27) para 4. See also Sandoval and Surfleet (n 10) 108.

Revista | Direitos Sociais e Políticas Públicas Unifafibe

cannot be obviated that, at the current level of development of international law, the State undoubtedly has an obligation of reparation, but not necessarily through large-scale administrative programmes, as Principle 16 suggests.[71] Furthermore, however appropriate they may be to satisfy the victims' right to reparation, the decision to establish them or not is– by now – entirely dependent on the political will within the State,[72] often influenced by factors that have nothing to do with the victims, among which political-economic arguments usually have considerable weight,[73] on the grounds that these programmes may undermine the country's economic and productive structure[74]. These factors acquire even greater relevance if the intention is to include measures in these programmes aimed at ensuring that transnational companies operating in the territory that have been involved in gross human rights violations restore the profits obtained through the commission of such violations. In such cases, legal limits may even exist *a priori*, in the form of investment agreements concluded with third States, and these may compromise the success of the measures indicated and generate diplomatic tensions with the affected States. To counter these arguments, a number of international legal norms and principles can be identified that seem to justify, and even oblige, the adoption of profit recapture measures. Our analysis here focuses on the rules and principles derived from the general regime of State

[71] In fact, it would also be possible for such subsidiary reparation to be resolved by some other formula based on international cooperation and/or voluntary contributions, such as victims' funds (e.g., the UN Voluntary Fund for Victims of Torture and the International Criminal Court's Trust Fund for Victims). Special trust funds are one of the two models of State practice for dealing with the financing of reparations. The other option is the allocation of a dedicated budget line for this purpose. This second model has been the most effective to date (Segovia, supra n 12 at 660).

[72] The lack of political will is a stronger determinant than socio-economic factors. UN Doc A/69/518 (n 27) paras 13 and 53; Segovia (n 73) 650-75. For Moffett, 'the engagement of domestic legal regimes to incorporate these norms in light of contentious social and political issues remains context-dependent.' Moffet (n **Erro! Indicador não definido.**) 60.

[73] Alexander Segovia, 'Financing reparations programs: reflections from international experience' in Pablo de Greiff (ed), *Handbook of Reparations* (OUP 2006); Gabriela Manrique Rueda, 'Lands, wars and restoring justice for victims' in Jo-Ann M Wemmers (ed), *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparations* (Routledge 2014); UN Doc A/69/518 (n 27) para 51-61.

[74] It is undeniable that the dimensions of human rights violations in these contexts are such that they make it difficult to compensate all victims fully. Sandoval et al (n 8) 20; Moffet (n **Erro! Indicador não definido.**) 61.

Revista | Direitos Sociais e Políticas Públicas Unifafibe

responsibility for internationally wrongful acts, which does mean that other norms might also be applicable.[75]

5.1 Rules on reparation

The State's own obligation to provide reparation in the form of restitution gives a first basis to take the necessary steps in this direction. The WG has noted that 'the aim of restitutionary remedies is *to avoid unjust enrichment* and restore the affected rights holders to the original position before the abuses occurred.'[76]. The doctrine of unjust enrichment – one that is well established in domestic legal systems and thus can be considered a general principle of international law – is particularly appropriate here. According to this principle, 'a person shall not be allowed to profit or enrich himself inequitably at another's expense.'[77] Such is the case of business enterprises that grow rich at the expense of violating human rights. The applicability of this principle would support, in general, the adoption of measures to restore corporate profits and, within the specific framework of restitution, those necessary to return to the victims the assets obtained by companies without any legitimate cause.

Should restitution prove impossible or should it not fully compensate the injury suffered – as occurs in the majority of human rights violations – the State should resort to other forms of reparation, what requires that the State allocate resources to the reparation programmes. It is here that the imposition on business enterprises of administrative measures involving a patrimonial charge or requiring the return of assets obtained as a result of human rights violations acquires critical importance, not only to counter their unjust enrichment, but also and above all, so that the State can dispose of sufficient resources to use in its reparations programme without losing sight of their victim-oriented

[75] For example, the 'clean hands' principle, or the principle of sovereignty over natural resources, as affirmed in UNGA Res 1803 (XVII) (14 December 1962), in particular para 2.3.
[76] WG Report (n 58) para 43 (emphasis added).
[77] Richard J. Long and Andrew Avalon, 'The Doctrine of Unjust Enrichment' (Long International 2021) 1 <https://www.long-intl.com/wp-content/uploads/2021/05/Long_Intl_The_Doctrine_of_Unjust_Enrichment.pdf> accessed 23 October 2021.

Revista | Direitos Sociais e Políticas Públicas Unifafibe

nature.[78] In this respect, to the extent that the State is responsible for the violations, the reparation programmes should not be restricted to the funds obtained thanks to the restitution of profits obtained by the companies through their abuse of human rights.[79]

Apart from their potential as a source of State revenue, measures against companies aimed at the restitution of profits can, in themselves, constitute a form of satisfaction. The WG, for example, identifies several sanctions of such nature, and which also allow the State to force businesses to return their profits. This is the case of fines, the confiscation of assets and community service orders.[80] Other possibilities include the establishment of special taxes targeting companies that may have benefited from violations[81] – a wealth tax or a once-off levy on corporate or private income[82] –, the levying of a retrospective surcharge on corporate profits extending back to a date to be agreed on,[83] or mandatory contributions to a reparations fund.[84] Linked to the question of satisfaction, it is worth mentioning the possibility of invoking the obligation to guarantee the non-recurrence of human rights violations in order to implement legislative reforms that provide for the restitution of companies' profits. As noted by the UN Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, '[t]o the extent that reparations are justice measures, they rest on general norms, and their benefits have important positive 'spill over' effects, one of which is to exemplify the fulfilment of legal obligations to take the violations of rights seriously.'[85] Likewise, among the initiatives that can constitute

[78] Adopting measures of this type with the sole purpose of correcting the unjust enrichment of the companies would mean ignoring their objective of providing redress. An exclusive concern with unjust enrichment would mean 'to right a wrong not by alleviating the adverse consequences to the victim, but by diminishing the position of others.' Emily Sherwin, 'Reparations and Unjust Enrichment' (2004) 84 BUL Rev 1443, 1444.
[79] ibid, para 57 b).
[80] ibid, para 52.
[81] ibid, para. 57 a).
[82] See South African Truth and Reconciliation Commission, *Final Report*, vol 6 s 2 (TRC 2003) 143 <https://www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf> accessed 23 October 2021.
[83] ibid.
[84] See Sandoval et al (n 8) 21.
[85] UN Doc A/69/518 (n 27) para 11. Among international bodies for the protection of human rights, note the clear stance taken by the UN Committee on the Rights of the Child ('UNCRC'), which has asserted that States 'should also guarantee non-recurrence of abuse through, for example, reform of relevant law and policy and their application, including prosecution and sanction of the business actors concerned.' UNCRC 'General Comment No. 16' (17 April 2013) UN Doc CRC/C/GC/16 10 [31].

Revista | Direitos Sociais e Políticas Públicas Unifafibe

guarantees of non-recurrence, the WG includes the introduction of 'legal reforms to plug regulatory gaps,'[86] where profit recapture measures could be included.[87]

Faced with these arguments, it could be claimed that States have other options for fulfilling their obligation to repair without affecting third parties[88] (and without negatively impacting the political-economic interests of the State and/or other obligations incumbent upon it under its investment agreements). Here, the application of the good faith principle of third parties (business enterprises, in this case) when establishing the possibility of taking profit recapture measures against them seems key. In this regard, the ILC noted that 'whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith.'[89]

5.2 Obligation not to recognize as lawful the consequences resulting from a serious breach

The ILC ARSIWA include another rule that *a priori* would not only justify but would even oblige the adoption of profit recapture measures: the obligation not to recognize as lawful the consequences resulting from a serious breach (that is, involving a gross or systematic failure by the responsible State to fulfil the obligation[90]) of a peremptory norm of international law. According to Article 41 ARSIWA, two consequences derive from the commission of such wrongful acts (without prejudice to other consequences that the

[86] WG Report (n 58) [53].
[87] Despite the provisions of the Principles on Reparation, we should stress the difficulty of considering the guarantees of non-recurrence as forms of reparation, given the different purposes of the two – namely, addressing the violations committed in the past and preventing future violations. See Moffet (n **Erro! Indicador não definido.**) 69-70.
[88] Yet it is debatable whether actual participation in reparation programmes is necessarily prejudicial to business enterprises. Sandoval, Filippini and Vidal consider that companies should help finance reparations even if they have not participated in human rights violations, arguing that '[i]t is, after all, in their economic interest to make sure that the country, and its people, move toward recovery and that the path is paved for the reconciliation of victims and perpetrators, as this is believed to have a positive impact on economic recovery.' Sandoval et al (n 8) 21.
[89] ILC (n 19) 98 [10] (Commentary on Draft Article 35).
[90] See Article 40 ARSIWA.

Revista | Direitos Sociais e Políticas Públicas Unifafibe

violation may entail under international law, such as reparation): the obligation of the States to bring to an end through lawful means any violation of this nature (paragraph 1) and the obligation of the States *not to recognize as lawful a situation created by a serious breach of this nature*, nor render aid or assistance in maintaining that situation (paragraph 2). It should be noted that obligations with the character of peremptory norms of international law do not arise from all rights,[91] but only with respect to those whose observance is imperative to guarantee the protection of human dignity.[92] While it is impossible to draw up a closed list, a useful parameter for their identification would be those with a strengthened protection via the classification of their breaches as crimes of international law – in particular crimes against humanity.

Regarding gross human rights violations, this rule, addressed to third States, could serve as a barrier to the requirement of compliance with the content, for example, of investment agreements. Moreover, the consequence of not recognizing as lawful a situation created by a violation of this nature applies also to the responsible State. In this regard, the ILC recalls that:

> There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach.[93]

Hence, the State that establishes a reparations programme could argue that its obligation not to recognize the situation created by the serious violation of human rights regulated by peremptory norms of international law prevents it from maintaining the profits obtained by companies as a consequence of these breaches. Moreover, since the obligation applies to

[91] UNHRC 'General Comment No. 29' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11 para 11. See also Theodoor C Van Boven, 'Distinguishing Criteria of Human Rights' in Karel Vasak and Philip Alston (eds), *The international dimensions of human rights* (Greenwood Press/UNESCO 1982) vol 1 43-48; Jaime Oraá, *Human Rights in States of Emergency in International Law* (Clarendon Press 1992) 94.
[92] Van Boven (n 91) 43-44.
[93] ILC (n 19) 115 [9] (Commentary on Draft Article 41).

Revista | Direitos Sociais e Políticas Públicas Unifafibe

all States, it should intensify international cooperation encouraging business enterprises to participate in reparation programmes.

However, following Dawidowicz, the main drawback of this principle is that its application in international practice is very limited, so that there are no conclusive elements to sustain its extension to any peremptory norm. What appears to be decisive here is not so much the nature of the norm breached as the fact that the unlawful situation gives rise to 'a *legal* claim to status or rights by the wrongdoing State which is capable of being denied by other States.' In other words, the principle would apply if the State intended to derive a status or a right for itself from the maintenance of that situation, which does not usually occur, for example, with respect to fundamental human rights violations or the commission of crimes against humanity. [94] However, the scenario that emerges here is, to some extent, the inverse: that is, reversing the effects of an unlawful act for which the State is ultimately responsible. In this context, we would expect claims from third parties (business enterprises and, by extension, foreseeably from their States of origin, especially if there are existing investment agreements) to preserve their status and/or acquired rights as a result of the unlawful act. The problem is that there are no precedents of the administrative adoption of measures against companies for serious violations of human rights. Likewise, there have been no cases of a State initiating a claim against an investor for human rights violations.[95] Thus, insofar as the measure would involve a serious violation of peremptory norms (and as long as there were channels via which a claim could be brought), it seems that compliance with the international legal obligation of not recognizing the situations derived from this violation should prevail over the content of any investment agreements, safeguarding in all instances the rights acquired by third parties in good faith.

5 CONCLUSIONS

[94] Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation,' in ed. J. Crawford, A. Pellet and S. Olleson, *The Law of International Responsibility* (OUP reprint 2013), 683.
[95] Lone Wandahl Mouyal, *International investment law and the right to regulate: a human rights perspective* (Routledge 2016) 154. The claims that have come to court have been brought by individuals.

Revista | Direitos Sociais e Políticas Públicas Unifafibe

Despite initiatives aimed at holding companies accountable for human rights violations, little progress has actually been made in this direction. This has meant the impossibility of requiring business enterprises to provide redress for victims other than via the judicial channels that each State might provide for this purpose. Consequently, in public international law today, responsibility for redressing human rights violations continues to lie with the States. This seems especially clear when such violations can be characterized as serious, that is, when they constitute gross or systematic violations of human rights protected by the peremptory norms of international law. Indeed, it is difficult to imagine a scenario in which violations of this nature are committed without the State incurring responsibility, either by action or by omission of its duty to protect human rights. Therefore, it is the State that should guarantee the victims the right to reparation, a right that occupies a key place in processes of transitional justice.

Precisely because of the huge scale of the violations that have to be addressed in a context of transitional justice, the most adequate mechanism to enforce this right are large-scale administrative programmes of reparation. These programmes represent a good opportunity for States to establish measures aimed at the restitution of the profits accrued by those companies that have been involved – directly or indirectly – in the commission of gross human rights violations. In this way, not only can the State rectify the unjust enrichment of these enterprises, but it is also able to obtain resources that can be assigned to victim reparation projects.

In practice, however, the States have shown themselves to be reluctant to implement reparation programmes and, more specifically, to adopt measures against companies. Their prioritization of other interests over those of victims' reparation lies behind this lack of political will to act. Nevertheless, the general regime of State responsibility for internationally wrongful acts provides various arguments to counter this resistance. Among rules on reparation, the need for restitution, combined with the principle of unjust enrichment, offers grounds to justify the adoption of measures aimed at the restitution of company profits, At the same time, these can also be considered measures of satisfaction

Revista | Direitos Sociais e Políticas Públicas Unifafibe

and, as such, they fulfil a reparative function. Similarly, according to the Principles on Reparation, they would fulfil this same function if they were designed as guarantees of non-recurrence, although the legal relationship between these guarantees and reparation has yet to be properly established, given their apparently different purpose. An in-depth analysis of this question lies beyond the scope of this paper.

Additionally, the ILC ARSIWA defend the existence of an international legal obligation not to recognize situations arising from the serious violation of a peremptory norm. If this is the case, the consequence would be, on the one hand, the obligation of the affected State to adopt the type of measures that have been defended here and, on the other, the duty of all other States to accept them. The invocation of this rule becomes therefore a powerful argument for avoiding, above all, the legal commitments that may derive from the existence of investment agreements with third States. However, we should recognise that international practice in this area remains highly insufficient to confirm the customary nature of this rule. Perhaps, by now, it is more useful to keep seeking to involve business enterprises in redressing the violations that they have committed than to promote the observance of this rule in the heart of the international community and to try to establish their autonomous responsibility, for which there seems to be no consensus among the States.