Business and Human Rights in Transitional Justice: Challenges for Complex Environments

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1. Introduction

This Chapter analyzes the business responsibility to respect human rights in 'complex environments,' meaning situations where there are widespread or systematic gross violations of international human rights law ('IHRL') and serious violations of international humanitarian law ('IHL').[1] The leading authority in the field of business and human rights ('BHR'), the United Nations Guiding Principles on Business and Human Rights ('UNGP' or 'Guiding Principles'), asserts that all businesses are to respect all human rights,[2] in all contexts, and at all times.[3] To realise this 'responsibility to respect', businesses should adopt policies and procedures aimed at identifying and mitigating the potential and actual risks they pose to human rights, known as 'human rights due diligence.'[4] The responsibility to respect is supplemented by a responsibility on businesses to remedy harms they cause or contribute to.[5]

The UNGP recognizes that '[s]ome operational environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors'.[6] In conflict-affected areas, businesses are advised to abide by IHL and to treat the responsibility to respect—normally expressed as social expectation—'as a legal compliance issue.'[7] They should engage external experts to ensure compliance with both IHRL and IHL.[8] This is the only additional and specific guidance

[1] The language here is chosen to align with the standards articulated in 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,' U.N. General Assembly Res. 60/147 (2005).
[2] The UNGP focuses on the Universal Declaration on Human Rights International Bill of Human Rights and the International Labor Organization's core conventions. United Nations Guiding Principles on Business and Human Rights ('UNGP'), U.N. Doc. A/HRC/17/31 (2011) at Principle 12, Commentary.
[3] UNGP, Ibid.
[4] Ibid at Principles 11-14 and Commentary.
[5] Ibid at Principle 19, Commentary.
[6] Ibid at Principle 23, Commentary.
[7] Ibid.
[8] Ibid.

given for businesses operating in complex environments. The limited engagement with complex environments in the UNGP is surprising. Many of the emblematic cases in BHR took place in situations with widespread or systematic gross violations of IHRL and serious violations of IHL: businesses supplying the Nazis with gas and chemicals used in the Holocaust;[9] business support for South Africa's apartheid regime;[10] the Nigerian military killing Ken Saro-Wiwa and the Ogoni leaders critical of Shell;[11] and the use of slavery, torture, and extrajudicial killings by the Burmese military to construct an oil pipeline for Unocal.[12]

The framing of the UNGP, and subsequent guidance on its interpretation,[13] leaves the impression that a business can respect human rights in even the most complex environments so long as they engage in sufficient human rights due diligence and mitigation efforts.[14] In this Chapter, I challenge that assumption. To do so, I invoke the findings of transitional justice ('TJ') mechanisms that have been entrusted with examining liability and pursuing accountability for IHRL and IHL violations in complex environments. I introduce TJ more thoroughly in section 3, below, but for now it is sufficient to note that TJ commonly refers to a range of processes employed by states emerging from conflict or authoritarianism to address past violations of IHRL and IHL.[15] Unlike international criminal law, which focuses on a narrow range of acts committed only by natural persons, TJ mechanisms supplement criminal prosecutions with other non-

[9] See, *Carl Krauch and Twenty-Two Others* (I.G. Farben Trial), United States Military Tribunal, Nuremberg, 14 August 1947 – 29 July 1948, Law Reports of Trials of War Criminals, Vol. X (1949) at 52.
[10] See, e.g., *In re South African Apartheid Litigation*, 617 F.Supp.2d 229 (S.D.N.Y 2009 at 283.
[11] See, Kiobel v Royal Dutch Petroleum Co., 569 U.S. 108 (2013).
[12] See, *Doe v. Unocal Corporation*, 395 F.3d 932 (9th Circuit, 2002).
[13] See, 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,' (June 2017), available at https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf (last accessed 20 July 2019) at 4, 5.
[14] For a similar conclusion on the UNGP approach, see, Geneviève Paul and Judith Schönsteiner, 'Transitional Justice and the UN Guiding Principles on Business and Human Rights,' in Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013) 74 at 84.
[15] Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (2010) ('SG Guidance Note'), available at https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 31 July 2018). See, also, Clara Sandoval, Leonardo Filippini and Roberto Vida, 'Linking Transitional Justice and Corporate Accountability' *in* Michalowski (n 15) 9 at 10-12. A unified theory of TJ is, however, difficult and there are competing explanations for the purpose and nature of TJ. Pablo de Greiff, 'Theorizing Transitional Justice,' *in* Melissa W. Williams, Rosemary Nagy, and Jon Elster (eds.), *Transitional Justice* (NYU Press 2012) 31 at 32; see also, generally, Susanne Buckley-Zistel, et al., *Transnational Justice Theories* (Routledge 2014).

judicial mechanisms.[16] These mechanisms sometimes (but not always) review the full range of IHRL violations.[17] Several TJ mechanisms have addressed the responsibility of businesses and business leaders for IHRL and IHL violations.[18] Their findings point to the potential limitations of the UNGP in complex environments by suggesting that certain contexts make it impossible for a business to respect human rights.

While there is growing literature on the relationship between TJ and BHR,[19] to date scholarship has primarily considered how BHR can be included in or inform the remit of TJ. The literature has not yet considered how TJ might challenge the UNGP approach to complex environments. It is important to debate the issue of complex environments now, during what is still the early stage of international and national efforts at implementing the UNGP. There is significant, but limited, national legislation implementing the UNGPs.[20] The UN Human Rights Council is currently developing and debating the scope and demands of a binding international treaty on business and human rights.[21] These efforts

[16] See, See, Diane F. Orentlicher, *'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency*, 1 INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 10 (2007).

[17] For an examination of why economic, social and cultural rights have often been neglected in this area, see, Naomi Roht-Arriaza, 'Why was the Economic Dimension Missing for So Long in Transitional Justice? An Exploratory Essay,' in Horacio Verbitsky and Juan Pablo Bohoslavsky (ed.), *The Economic Accomplices to the Argentina Dictatorship: Outstanding Debts* (Cambridge 2015).

[18] For an extensive examination of the findings by TJ mechanisms, see, Pax, 'Everyone's Business: Corporate Accountability in Transitional Justice: Lessons for Colombia' (2017), *available at* https://www.dejusticia.org/wp-content/uploads/2017/05/PAX_COL_PZ_BIZ_FINAL_WEB.pdf?x54537 (last accessed 15 June 2018).

[19] See, e.g., Michalowski (n 15); Verbitsky and Bohoslavsky (n 17); Tara L Van Ho, 'Is it Already Too Late for Colombia's Land Restitution Process?' (2016) 5 *International Human Rights Law Review* 60-85; Leigh A. Payne and Gabriel Pereira, 'Corporate Complicity in International Human Rights Violations,' (2016) 12 *Annual Review of Law and Social Science* 63; Sabine Michalowski, 'No Complicity Liability for Funding Gross Human Rights Violations?' (2012) 30 *Berkeley Journal of International Law* 451; Nadia Bernaz, 'Establishing Liability for Financial Complicity in International Crimes,' in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (eds.), *Making Sovereign Financing and Human Rights Work* (Hart 2014) 61; Paloma Muñoz Quick, 'Buscando la reconciliación: Planes de Acción para lograr la transición,' *in Derechos Humanos y Empresas: Reflexiones desde América Latina* (Instituto Interamericano de Derechos Humanos 2017) at 313.

[20] For an overview of existing standards and national efforts at new standards, see, Business and Human Rights Resource Centre, 'Mandatory Due Diligence,' available at https://www.business-humanrights.org/en/mandatory-due-diligence (last accessed 20 July 2019); Business & Human Rights in Law, 'Mapping Key Developments,' available at http://www.bhrinlaw.org/key-developments (last accessed 20 July 2019).

[21] Compare: 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises,' Zero Draft (16 July 2018), available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf (accessed 31 July 2018); OEIGWG Chairmanship Revised Draft 16.7.2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

make it necessary to understand the limitations of the soft-law Guiding Principles so that subsequent hard-law implementation efforts can better respond to these challenges.

In this Chapter, I review the expectations set out in the UNGP and authoritative guidance before discussing scholarship that suggests human rights due diligence is simply not enough in certain complex environments. I then scrutinize some of the most pertinent findings in TJ. In analysing the lessons from TJ, I argue that the overarching context of a complex environment may make it impossible for a business to comply with its responsibility to respect. In such circumstances, the only means to realise the responsibility is to leave the context fully. This presents a challenge for BHR as generally only foreign companies would have the luxury of leaving a context. This might call for the re-consideration of another assumption within BHR: that the UNGP apply equally to all businesses at all times.

2. The UNGP and Complex Environments

The UNGP's tripartite approach to BHR is well-known to readers of this volume: states are to protect human rights, meaning to regulate and respond to threats by businesses and other third party actors; businesses are to respect human rights; and both businesses and states are to ensure victims have access to effective remedies when businesses do negatively impact on human rights.[22] In a complex environment, the widespread or systematic violations of IHRL and IHL indicate that a state is either unable or unwilling to meet its duty to protect. Operating independently of the state's duty to protect,[23] the business responsibilities to respect and remedy become even more important in these environments. This section examines these responsibilities before considering why 'complex environments' raise a concern about the framing of these responsibilities.

2.1. The Responsibility to Respect

At times presented as merely requiring that businesses 'do no harm', the responsibility to respect has both negative and positive elements to it. Businesses must not

[22] UNGP (n 2).
[23] Ibid at Principle 11, Commentary.

interfere in the realisation or enjoyment of human rights.[24] To do this they must establish and undertake human rights due diligence to identify and mitigate actual and potential risks they pose, and communicate the outcome to affected stakeholders.[25] Businesses are to undertake human rights due diligence 'regardless of their size, sector, operational context, ownership and structure,' although some of these factors can affect the scope of the process.[26] Where practicalities require a business to set priorities, the business should, at a minimum, focus on any 'severe' impacts it causes, contributes to, or is directly linked to.[27] As noted above, the UNGP recognize that businesses in conflict-affected areas should treat the responsibility to respect as a 'legal compliance issue,' and use external experts to ensure they abide by both IHRL and IHL standards.[28] The UN Office of the High Commissioner for Human Rights ('OHCHR') indicates that in certain circumstances the balance of factors can require a business to terminate a relationship with another actor in order to meet its responsibility to respect.[29]

2.2. The Responsibility to Remedy and the 'Participation Terms'

The business responsibilities to respect and remedy are interlinked, and the exact relationship between them is delicate. As the author of the UNGP John Ruggie has rightly argued, a business should undertake human rights due diligence by looking at the impacts of its operations, products, services, and relationships.[30] Only after the impacts are identified can the business determine its relationship to each harm.[31] Where a business 'causes' or 'contributes to' a harm, it must mitigate and remediate the harm.[32] The UNGP do not require a business to violate domestic law,[33] and the UNGP suggests a robust

[24] Ibid at Principles 11, 14-15 and Commentary.
[25] Ibid at Principles 11, 14-16 and Commentary
[26] Ibid at Principle 14.
[27] Ibid. David Birchall examines the meaning of the UNGP's choice of 'impact' instead of 'violation' in 'Any Act, Any Harm, to Anyone: The Transformative Potential of 'Human Rights Impacts' under the UN Guiding Principles on Business and Human Rights,' (2019) 1 *University of Oxford Human Rights Hub Journal* 121.
[28] UNGP (n 2) at Principle 12, Commentary.
[29] OHCHR (n 13) at 7, n 27.
[30] John Ruggie, Letter to Prof. Dr. Noel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct, 6 March 2017, available at https://www.business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017%20v2.pdf
[31] Ibid.
[32] UNGP (n 2) at Principle 17, Commentary.
[33] Ibid at Principle 23, Commentary.

process might be a mitigating factor when assessing liability, although the process will not simply absolve a business of its responsibility to remedy.[34]

According to the OHCHR, a business 'causes' an impact when its own actions or omissions directly lead to a reduction or the elimination of 'the ability of an individual to enjoy his or her human rights'; it 'contributes' to an impact where its actions and omissions 'either directly alongside other entities or through some outside entity' lead to the reduced enjoyment of a right.[35] Where a business is merely 'directly linked to' an impact, however, it does not owe a responsibility to provide remedies. A business can have a 'direct link' where it has neither caused nor contributed to the impact but where its products, services, operations, or business relationships are 'directly linked to' the harm.[36] The business can choose how to proceed in light of several factors, and may, in certain circumstances, choose to use its leverage to affect change in the operations or activities of its business partners rather than terminate the relationship.[37] In deciding how to proceed, the business should consider the strength of its leverage, 'how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have any adverse human rights consequences.'[38] These factors do not carry equal weight. The severity of the abuse is the primary consideration.[39]

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[34] Ibid at Principle 17, Commentary.

[35] See, OHCHR (n 13) at 4-5. Given their importance, there has been surprisingly little engagement with the participation terms. Two pieces describe or apply the participation terms in line with the OHCHR's guidance: Chiara Macchi, Tara Van Ho, Luis Felipe Yanes, 'Investor Obligations in Occupied Territories: A Report on the Norwegian Global Pension Fund – Global' (2018), available at https://www1.essex.ac.uk/ebhr/activities/default.aspx; Rachel Davis, 'The UN Guiding Principles on Business and Human Rights in Conflict-Affected Areas: State Obligations and Business Responsibilities, (2012) 94 *International Review of the Red Cross* 961. The only other scholarship to date to address the participation terms beyond a passing reference are: Robert C. Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance,' (2012) 48 *Texas International Law Journal* 33 at 49; Björn Fasterling and Geert Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights,' (2013) 116 *Journal of Business Ethics* 799 at 809. Both pieces note problems with the terms, but do not engage with their meaning or application. David Birchall also has a forthcoming piece addressing the difficulty of applying the participation terms. 'Irremediable Impacts and Unaccountable Contributors: The Possibility of a Trust Fund for Victims to Remedy Large-Scale Human Rights Impacts,' *Australian Journal of Human Rights* (forthcoming) (on file with the author).

[36] OHCHR, ibid, at 6.

[37] UNGP (n 2) at Principle 19, Commentary.

[38] Ibid.

[39] Ibid at Principles 14, 19, Commentary.

The 'cause, contribute, directly linked to' participation terms indicate when a business's remedial responsibilities are triggered. The provision of remedies is the means by which the rights of victims and the responsibilities of businesses are enforced and enforceable.[40] Consequently, while all businesses are supposed to undertake human rights due diligence, it appears that a business fails to respect human rights only when it causes or contributes to a harm. The OHCHR has clarified, however, that the participation terms sit on a 'continuum'; a failure to respond appropriately when a business is only 'directly linked to' a harm can mean that the business moves along the continuum towards or into the 'contributing to' territory.[41] Ruggie agrees.[42] In comments on the human rights responsibilities of banks, he suggests several factors that could move a company along the continuum: 'the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it.'[43]

In addition to the three participation terms—cause, contribute and directly linked to—the UNGP introduces notions of 'legal' and 'non-legal' complicity.[44] It is unclear whether and exactly how forms of complicity relate to the participation terms, but 'legal complicity' seems to correspond, at least reasonably, to the two forms of participation for which a business owes remediation.[45] The use of both sets of terms introduces an element of uncertainty, particularly for complex environments. In a 2008 report where he examined definitions of complicity, Ruggie concluded that '[w]hat constitutes complicity in both legal and non-legal terms is not uniform, nor is it static.'[46] Drawing on international criminal law, he found that 'mere presence' should not give rise to legal liability.[47] Instead,

[40] For more on remedies, see UNGP (n 2) at Principle 25, Commentary.
[41] Ruggie Letter (n 32) at 6-7.
[42] John Ruggie, 'Comments on the Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles in a Corporate and Investment Banking Context' (21 February 2017), available at https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2017.pdf.
[43] Ibid.
[44] UNGP (n 2) at Principle 17, Commentary.
[45] The UNGP brings the two sets of terms together only once: 'Typically, civil actions can also be based on an enterprise's alleged contribution to a harm.' Ibid. Yet, he uses international and national criminal law and domestic civil claims to define 'legal complicity,' suggesting this is the trigger for remedies.
[46] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, U.N. Doc. A/HRC/8/16 (2008) ('Complicity Report') at para 70.
[47] Ibid at para 39.

a business is complicit in a crime when it provides a 'substantial contribution to the crime, such as legitimizing or encouraging the crime.'[48] The mixture of language he used in the UNGP three years later–'legal complicity in' and 'causing' or 'contributing to' a violation–makes it difficult to ascertain if Ruggie intended for the 2011 UNGP to exclude beneficial relationships from the 'contributing to' standard. Ruggie's conclusions on complicity are tainted by a limited engagement with legal sources.[49] In his 2008 report, he substantively engaged only with the findings of the *ad hoc* international criminal tribunals for the Second World War, Rwanda, and the former Yugoslavia, and with civil cases from the United States and the United Kingdom.[50] In the report, Ruggie briefly noted the findings of the South African Truth and Reconciliation Commission ('South African TRC') on the responsibility of businesses that benefitted from apartheid, discussed below.[51] Without explanation, he concluded that 'benefiting is a relevant consideration in non-legal contexts.'[52] Complex environments, however, raise the potential that 'mere presence' not only adds legitimacy but can foster, entrench, or exacerbate certain IHRL and IHL violations.

Ruggie suggests that a business needs to take active steps to 'cause', 'contribute to', or be 'complicit in' a violation, and the UNGPs suggest that the nature of an impact might mean that a business needs to terminate a relationship.[53] Neither directly address when a business should avoid or leave a complex environment because the context itself renders compliance with the responsibility to respect impossible.[54] This appears intentional. If 'mere presence' is insufficient for legal liability, then there is no need to discuss the impact of an overarching environment. A business might be able to limit its impacts and justify continued operations so long as it manages its relationships. This approach is questionable. As Geneviève Paul and Judith Schönsteiner have argued, in

[48] Ibid at para 39.
[49] Ibid.
[50] Ibid at paras 49-53. Ruggie mentions other states but only to acknowledge that they recognize corporate criminal responsibility for complicity in international crimes. Ibid.
[51] Ibid at para 41.
[52] Ibid.
[53] See, above (n 39-40); Paul and Schönsteiner (n 14) at 84.
[54] Paul and Schönsteiner, ibid.

situations with widespread or systematic violations, a business's 'mere presence' might entrench, exacerbate, or condone gross or serious violations of IHRL and IHL.[55]

2.3. The Problem of Complex Environments

In complex environments, the UNGP even suggest that relational efforts might matter more than outcome. Immediately after explaining that 'all business enterprises have the same responsibility to respect human rights wherever they operate' regardless of the context, the official Commentary to the Guiding Principles notes that '[w]here the domestic context renders it impossible to meet [the] responsibility [to respect] fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.'[56] Businesses faced with this difficult situation should ensure they do not 'exacerbate the situation.'[57]

Relying on a relational approach to the responsibility to respect fails to address the significance of the context and the harms in complex environments.[58] This approach may be appropriate for incidents where the law prohibits full compliance with IHRL, but not where the law requires effective participation in gross or serious violations in complex environments. To date, the literature on issues of BHR in armed conflicts has principally ignored[59] or predates the UNGP,[60] describes the UNGP approach[61] or outlines challenges facing particular industries, most notably the security sector,[62] or focuses on how businesses can better respect or promote human rights in conflict-affected areas.[63] Notably,

[55] Ibid at 84.
[56] UNGP (n 2) at Principle 23, Commentary.
[57] Ibid.
[58] Ibid.
[59] See, Brian Ganson and Achim Wennmann, 'Business and Conflict in Fragile States,' (2015) 55 *Adelphi Series* 457-458. DOI: 10.1080/19445571.2015.1189153.
[60] See, e.g., Olga Martin-Ortega, 'Business and Human Rights in Conflict,' (2008) 22 *Ethics & International Affairs* 273; Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses,' (2001) 24 *Hastings International and Comparative Law Review* 339.
[61] See, Davis (n 31).
[62] Alan Bryden and Lucía Hernández, 'Addressing Security and Human Rights Challenges in Complex Environments,' (2015) 1 *Business and Human Rights Journal* 153.
[63] Daria Davitti, 'Away from the Spotlight: Foreign investment in the Afghan Extractive Sector and the State's Duty to Protect the Right to Water,' *in* Celine Tan and Julio Faundez (eds.), *Natural Resources and Sustainable Development* (2017) 96.

Andreas Graf and Andrea Iff call for the integration of 'conflict-sensitive business practice' with human rights due diligence.[64] Graf and Iff recognize that the fluid nature of armed conflicts means that once a business enters a conflict-affected area it can 'unwillingly or unknowingly cause or exacerbate conflict and consequentially face new and largely unforeseeable human rights risks.'[65] The instruments developed for 'conflict-sensitive business practice' can, amongst other benefits, help identify risks and appropriate actions for mitigation and redress.[66] Yet, Graff and Iff do not explicitly address whether the nature of a conflict can render it impossible for a business to respect human rights, nor do they question what this reality means for the UNGP's approach to the business responsibilities to respect and remedy.

The literature on businesses operating in in situations of occupation, which are governed by the laws of armed conflict,[67] is clearer and more consistent in finding that a context can make it impossible for a business to continue operations while respecting human rights.[68] A recent report by the Essex Business and Human Rights Project ('EBHR Report'), which I co-authored, considers the responsibility of businesses operating in the occupied Palestinian territories.[69] We concluded that if a business directly engages in war crimes, such as unlawfully taking property from Palestinians (pillage),[70] it causes the attendant human rights impacts.[71] Questions of contribution, however, were more difficult and tied to the facts on the ground. We considered the responsibility of those that sell equipment known to be, or likely to be, used in home demolitions or the construction of

[64] Andreas Graf and Andrea Iff, 'Respecting Human Rights in Conflict Regions: How to Avoid the 'Conflict Spiral,' (2017) 2 *Business and Human Rights Journal* 109.
[65] Ibid at 115.
[66] Ibid at 122-131.
[67] See, e.g., [Geneva] Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1949) at article 2. This article is common to all four Geneva Conventions.
[68] See, Macchi, Van Ho and Yanes (n 38); Valentina Azarova, 'Business and Human Rights in Occupied Territory: The UN Database of Business Active in Israel's Settlements,' (2018) 3 *Business and Human Rights Journal* 187-209. See, also, Office of the High Commissioner for Human Rights (OHCHR), 'Database of All Business Enterprises Involved in the Activities Detailed in Paragraph 96 of the Report of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem,' UN Doc. A/HRC/37/39 (2018) at para 40.
[69] Macchi, Van Ho and Yanes (n 38). The report focused specifically on the responsibility of institutional investors, which are themselves business enterprises. For a more thorough discussion, see, Tara L Van Ho and Mohammed K AlShaleel, 'The Mutual Fund Industry and the Protection of Human Rights,' (2018) *Human Rights Law Review* 1-29.
[70] For more on pillage, see below (n 128).
[71] Macchi, Van Ho and Yanes (n 38) at 19-20.

illegal Israeli settlements.[72] The destruction of Palestinian homes in occupied territory occurs on a widespread, systematic, and discriminatory basis, and as such constitutes both a war crime and a violation of IHRL.[73] The construction of Israeli settlements in occupied Palestine is illegal under international law, constitutes a war crime, and the settlements are widely linked to a myriad of human rights impacts, including, *inter alia*, the rights to property, housing, food, water, free movement, and non-discrimination.[74] While the equipment used in the home demolitions and settlement construction can have both legitimate and illegitimate purposes, the context and the consistency of the violations indicate that the sale of equipment furthers a pattern of abuse such that even if an individual sale of a particular piece of equipment does not result in the commission of a war crime, the sales collectively facilitate the commission of those crimes. Businesses know or should know that they are helping to further the war crimes, and thereby the reduction of human rights. Similarly, the Israeli legal system makes it impossible for Israeli banks to withhold funding from settlements.[75] The financing provides material support for an act that directly leads to a reduction in the realization of several human rights. The context means that Israeli banks can never meet their own responsibility to respect because they are required to routinely contribute to structural and systematic violations of IHRL.[76]

These conclusions largely align with those of the United Nations and other scholars focused on BHR in occupied Palestine. The UN Human Rights Council called the violations associated with the settlements 'immitigable' and stated that businesses should, *inter alia*, 'avoid contributing to the establishment, maintenance, development or consolidation of Israeli settlements.'[77] OHCHR has concluded that it is 'difficult to imagine a scenario in which a company could engage in' operations in or routine transactions with the settlements 'in a way that is consistent with the Guiding Principles and international law.'[78] Valentina Azarova similarly argues that by merely operating in the settlements,

[72] Ibid.
[73] Ibid at 14-15.
[74] Ibid at 14-20.
[75] Ibid at 20.
[76] Ibid at 25.
[77] UN Human Rights Council (UNHRC) Resolution, 'Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan,' UN Doc A/HRC/RES/34/31 (2017).
[78] OHCHR, Database (n 67) at para 41.

businesses 'invariably contribute' to the establishment and 'entrenchment' of settlements that constitute, by their nature, violations of IHL and IHRL.[79]

One might argue that the issue of settlements can be adequately addressed through a relational lens: the business responsibility is triggered because of its relationship to the settlements. This might be appropriate for those who sell or transfer equipment for the destruction of Palestinian homes or the construction of the settlements. With the banks, however, the law requires their contribution to human rights violations. The context, rather than their relationships, change what might otherwise seem like passive involvement into active and material support for human rights violations. Paul and Schönsteiner are therefore right to criticize the UNGP for failing to engage with the unique problems stemming from complex environments.[80] Here, the findings of TJ mechanisms can be informative. The next section considers how TJ mechanisms have addressed businesses' and business leaders' responsibility for human rights violations in complex environments.

3. The Findings of Transitional Justice

This section examines the findings of a select number of TJ mechanisms to consider the limits of the UNGP in complex environments. As I explained above, TJ commonly refers to the means by which states emerging from conflict or oppressive regimes address their histories of widespread and systematic IHRL and IHL abuses.[81] There is no single approach to TJ. Instead, based on their context, priorities and needs, states employ a combination of judicial and non-judicial mechanisms to secure accountability for the past, to provide reparations to victims, and to encourage social reconciliation.[82] Common mechanisms include truth commissions, judicial prosecutions, reparations programmes, and 'guarantees of non-recurrence,' meaning institutional, legal, and social reforms aimed at ensuring the non-repetition of past abuses.[83] Several TJ mechanisms have considered the responsibility of businesses and/or business leaders for their role in past violations of IHRL

[79] Azarova (n 67) at 195, 198.
[80] Paul and Schönsteiner (n 14) at 71.
[81] See (n 15).
[82] SG Guidance Note (n 15) at 7-10; Sandoval, Filippini and Vidal (n 15) at 10.
[83] See, Orentlicher (n 16).

and IHL.[84] The benefit of TJ for BHR stems from the fact that in practice its mechanisms often reach beyond criminal law. Both TJ and international criminal law have their origins in the military tribunals following the Second World War.[85] TJ mechanisms include criminal prosecutions, but many of the non-judicial mechanisms engage more thoroughly with the whole of IHRL.[86] Additionally, non-judicial TJ mechanisms are often entrusted with establishing historical and contextual causes of abuse.[87] As such, they sometimes consider the role played by institutions or segments of society in developing or carrying out abuse, and have often address actors who cannot or will not be prosecuted by the state.

In this section and the next, I consider how TJ can inform the BHR approach to complex environments. Scholars researching on the intersection of BHR and TJ generally agree the following states' experiences are the most significant for BHR: Argentina, Brazil, Germany, Guatemala, Liberia, South Africa, Sierra Leone, and Timor Leste.[88] A thorough analysis of each situation is beyond the scope of this Chapter, and has been undertaken elsewhere.[89] I focus only on pertinent developments suggestive of the extent to which an environment, rather than a relationship, might inform a business's ability to respect human rights. I group the findings under two headings: material support for IHRL and IHL violations; and benefitting from violations that the business did not directly participate in. This division highlights that BHR's contextual problems are not limited to 'beneficial relationships,' although the responsibility for those relationships needs to be better understood.

[84] For an overview, see, Pax (n 18).
[85] For literature on international criminal law and BHR, see, e.g., Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities,' (2013) 12 *Chinese Journal of International Law* 43 at 52; Florian Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial,' (2010) 8 *Journal of International Criminal Justice* 783; Shane Darcy, 'The Potential Role of Criminal Law in a Business and Human Rights Treaty,' *in* Surya Deva and David Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (2017) 439.
[86] See, generally, SRSG (n 15); Pax (n 18).
[87] For an analysis of different truth commission mandates, see, e.g., Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (Routledge 2011).
[88] See, e.g., Pax (n 18); Michalowski (n 15).
[89] See, Pax (n 18).

3.1. Active Support for IHRL and IHL Violations

3.1.1. Second World War Cases

Following the Second World War, Allied States prosecuted business leaders for supporting the Holocaust by providing gas and drugs used at the concentration camps, for crimes against peace for supporting general war efforts, and for crimes against humanity because they benefitted from both illegal confiscations of property for their businesses and slave labour made available to them from the concentration camps.[90] The businesses themselves were not subject to criminal trial under the presumption that legal entities could not be held criminally accountable.[91] Businesses identified as a threat to international peace were instead punished by being liquidated or put into trusteeship and eventually sold to new owners.[92] For this Chapter, the international tribunals' findings on the responsibility of individual business leaders are more telling than the dismantling of the businesses themselves.

In the *Flick* case, the defendants were the principle proprietor and leading officials of several related businesses, including mines and steel plants.[93] They were each accused of taking part in the enslavement of civilians for use in industrial activities aimed at benefiting the Reich government's war efforts.[94] Some of the individuals were accused of additional crimes, but it is the Tribunal's approach to the accusations around enslavement of civilians that is most telling. On the facts, the Tribunal found that, with one exception, the acts of enslavement were required, orchestrated, and monitored by the government.[95] Objecting to the use of enslaved civilians likely would have been 'construed as sabotage and would be treated with summary and severe penalties, sometimes resulting in the imposition of death sentences.'[96] While the defendants were unable to object to the use of

[90] For overviews of the cases, see, Jessberger (n 96).
[91] See, van der Wilt (n 96) at 52-53.
[92] See, Control Council Law No. 9, 'Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof,' Pub. L. No. I, Enactments and Approved Papers of the Control Council and Coordinating Committee, 225 (1945), available at http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW06.pdf.
[93] *Trial of Friedrich Flick and Others*, United States Military Tribunal, Case No. 48, Law Reports of Trials of War Criminals, Vol. IX (1947).
[94] Ibid.
[95] *Flick* (n 104) at 7-8.
[96] Ibid at 7.

slave labour, the Tribunal found that the conditions at the plant were humane.[97] As such, the four defendants who took 'no active steps towards the employment of slave labour and … would have been exposed to danger had they in any way objected to or refused to accept the employment of the forced labour allocated to them' could invoke the defence of necessity.[98] Two of the defendants, however, had actively sought to procure forced labour from the government.[99] The Tribunal found that these acts 'were taken not as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible.'[100] These two defendants were convicted for participating in the enslavement of civilians.[101]

In *Carl Krauch and Twenty-Two Others*, known as the 'I.G. Farben Trial,' the tribunal similarly allowed those who did not intentionally seek forced labour from the government to invoke the defence of necessity.[102] On the basis of the same reasoning as *Flick*, those who took an 'active part in the procurement of such forced labour, fully aware of the hardships and sufferings to which such labourers were exposed' were convicted on the charge.[103] The 23 Farben defendants faced numerous other charges, of which two more are significant for this chapter: supplying poison gas and drugs for use in gas chambers or as part of medical trials (discussed here); and plunder and spoliation (discussed below in 'benefitting from violations'). On the evidence presented, the Tribunal found that the provision of Zyklon-B, a poisonous gas, was 'actually used in the mass extermination of inmates of concentration camps, including Auschwitz.'[104] Yet, the defendants did not and could not have known how the gas was being used.[105] The gas was originally manufactured as an insecticide and neither the volume nor the locations for delivery of the gas were suspicious in light of the context.[106] Similarly, some of the defendants had supported trialling typhus medication in the camps, but were unaware that trials were taking place on

[97] Ibid at 9.
[98] Ibid at 9, 30.
[99] Ibid at 8.
[100] Ibid at 10.
[101] Ibid at 2, 30.
[102] *Krauch* (n 9) at 28.
[103] Ibid at 26-28.
[104] Ibid at 24.
[105] Ibid at 23-24.
[106] Ibid at 23-24.

concentration camp inmates who had been intentionally infected with typhus.[107] When they became aware of the conditions of the trials, the defendants stopped sending the drugs to the camps.[108] The defendants were acquitted of these charges. The *Krauch* acquittals can be easily contrasted with those in *Bruno Tesch and Two Others*, where the defendants were also accused of supplying the Nazi regime with Zyklon-B.[109] There, evidence that the defendants supplied the gas despite knowing its purpose led to their convictions.[110] As Sabine Michalowski explains, the difference between the two cases suggests that criminal liability arises only where a business voluntarily supplies goods it knows will be used for criminal purposes.[111]

The Tribunals' analysis in these cases suggests that the conditions of the Nazi regime were such that businesses were required to participate in and contribute to certain violations of IHRL as objecting was not only futile but could result in severe punishments. Where the overarching legal and political context required the business leaders (and thereby the business) to participate in violations, the defendants were acquitted. Where, however, defendants went beyond what was required by the situation to knowingly, actively, and unnecessarily participate in or provide support for a violation, they bore criminal responsibility. The context was no longer a defence because it was not the context that dictated the defendants' conduct.

3.1.2. Argentina's truth commission and prosecutions

Several truth commissions have also identified individual businesses or business leaders that actively supported the commission of IHRL and IHL violations.[112] The truth commissions in Argentina, Brazil, and Guatemala each came to similar conclusions that businesses supported the relevant regime's arrest, detention, or torture of individuals.[113] The Argentinian truth commission's findings, and the subsequent conviction of business leaders by courts, is particularly detailed and instructive.

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[107] Ibid at 24-25.
[108] Ibid at 25.
[109] Bruno Tesch and Two Others, (1947) 1 Law Reports of Trials of War Criminals 93.
[110] Ibid.
[111] 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 at 461-462.
[112] See, generally, Pax (n 18).
[113] Pax (n 18) at 70, 79-81, 96-97.

From 1976 to 1983, a series of military juntas undertook widespread and systematic violation in the name of protecting and promoting capitalism and capital.[114] The military considered that labour unions and their leaders posed a threat to the military leadership and the capitalist economy.[115] At least 9,000 people were enforcedly disappeared or tortured, including many union organisers.[116] In its 1984 report, Argentina's National Commission on the Disappearance of Persons (CONADEP), the state's first truth commission, identified 11 corporations involved in illegal detentions and enforced disappearances during the predecessor military regime.[117] The businesses named did not simply benefit from a robust military dictatorship; the report suggests they actively sought the military's support by identifying individual labour activists for detention.[118] The Commission heard that the labour relations manager for the car company Ford stated in a meeting to union delegates that 'the company no longer recognized their status…. At the end of the meeting he said mockingly to them, "You'll be giving my regards to a friend of mine."'[119] Two days later, they were subjected to enforced disappearances.[120] In 2015, following the revocation of the state's amnesty laws, the Argentinian Ministry of Justice and Human Rights identified 25 companies it concluded were complicit in enforced disappearances and murders.[121] Individual leaders within Ford were prosecuted, and two were convicted in December 2018.[122] When determining the culpability of the two, the Court found that the company had not simply benefitted but had actively contributed to the identification of workers for the military to target, and had provided food, equipment, gasoline, and facilities for a

[114] See, Pax (n 18) at 68.
[115] CONADEP, *Nunca Más (Never Again)* at Part II, Chapter H, reproduced at http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm
[116] See, Pax (n 18) at 68.
[117] Juan E. Mendez, 'Truth and Partial Justice in Argentina: An Update,' Human Rights Watch (1991) 18, available at https://www.hrw.org/sites/default/files/reports/argen914full.pdf (accessed 27 June 2018); Pax (n 17) at 66-67.
[118] CONADEP (n 115).
[119] Ibid at Part II, Chapter H.
[120] Ibid.
[121] Ministry of Justice and Human Rights, 'Responsibilidad Empresarial en delitos de lesa humanidad: Represión a trabajadores durante el terrorismo de Estado (Tomo II)' (2015), at 407, available at http://www.cels.org.ar/common/Responsabilidad_empresarial_delitos_lesa_humanidad_t.2.pdf (last accessed 30 June 2018).
[122] The reasoning was only released in March 2019 and could not be translated in time for use in this Chapter. Victoria Basualdo, 'The Ford Trial in Argentina, a Workers' Victory,' JusticeInfo.net, available at https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/40813-the-ford-trial-in-argentina-a-workers-victory.html

'clandestine detention centre' that housed disappeared workers.[123] IHRL violations were widespread and systematic, but for the Argentinian courts that did not justify the Ford employees' conduct. It was not the context that caused the specific violations, but instead, the business leaders took specific acts to facilitate, cause, and contribute to the violations.

3.2. Benefiting from Violations

While Ruggie suggests benefitting from human rights violations should not lead to legal liability, the findings from TJ suggest the issue is more complicated. Some TJ mechanisms have also considered the responsibility of businesses (and business leaders) that benefitted from IHRL and IHL violations. Here, I focus on a limited number of TJ mechanisms: I return to the *Krauch* decision before examining findings from South Africa's and Timor-Leste's truth commissions, and land restitution efforts in Colombia.

3.2.1. The *Krauch* decision

While the *Krauch* tribunal's approach to enslavement is discussed above for its approach to 'active support' for the war crimes relating to enslavement, the court's approach to both enslavement and the war crime of spoliation are also important for understanding beneficial relationships. Both sets of charges involved active and passive (or beneficial) participation in war crimes that also breached human rights. As noted above, the enslavement charges involved both active and passive participation, with criminal convictions arising only where a business leader actively sought to secure more slaves from the government.[124] All but one of the *Krauch* defendants were also accused of 'spoliation,'[125] which refers to the unlawful transferring of property in the context of an armed conflict, including from 'protected persons' such as civilians in occupied territory.[126]

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[123] Ibid.
[124] See, above (n 102-108).
[125] *Krauch* (n 9).
[126] 'Spoliation' has traditionally been understood as the non-violent version, with 'plunder,' 'pillage,' or 'looting' involving violence. Jurisprudence, however, clarifies that there is no distinction as the latter three do not require violence. For an extensive discussion of the jurisprudence on this issue, see, James G. Stewart, 'Prosecuting the Pillage of Natural Resources,' Open Society Foundation (2011) at 15-17. The International Criminal Court's 'Elements of the Crimes' similarly does not require violence in the commission of 'pillage,' defining the war crime, as the court did with 'spoliation' in *Flick*, to refer to the unlawful appropriation of property for private or personal use in the context of an armed conflict. See, International Criminal Court, 'Elements of Crimes' (2011) at Arts 8(2)(b)(xvi), 8(2)(e)(v). The ICC crime of pillage excludes taking of property when it is militarily necessary, but this is a controversial position. See, Stewart (above, this note) at 20-22.

The Nazi regime had 'adopted and pursued a general policy of plunder of occupied territories,' and exploited those territories 'for the German war effort in the most ruthless way.'[127] As a result, Farben was given property it was not entitled to after the German government and military confiscated property in violation of IHL.[128] Similar to its approach to enslavement, the Tribunal differentiated between those Farben leaders who actively pursued involvement in the crime by seeking preferential treatment from the government or lobbying for the spoliation, and those who were merely present during the commission of the crime.[129] The former were convicted while the latter were acquitted.

The criminal convictions for spoliation and enslavement both turned on whether the defendants took active steps to secure the commission of crimes as opposed to those that merely benefitted. As Annika van Baar has rightly stated, '[c]orporate involvement in international crimes … tends to be mutually beneficial to both the corporation and the perpetrators of international crimes,' although '[t]he benefit for the corporation does not always involve profits and does not always materialise.'[130] At times, the benefit itself may be the involvement in the crime, as was the case for various *Krauch* defendants in regards to both participation in enslavement and spoliation. It would be wrong to suggest, however, that because the tribunals found the defendants did not incur criminal liability that the business itself was not 'causing' or 'contributing to' crimes, and consequently failing to meet the standard now expected by the responsibility to respect. Instead, the cases suggest the limits of relying on criminal law convictions or acquittals to interpret and define BHR expectations. As Michalowski has pointed out, the convictions and acquittals of individual business leaders by the military tribunals turned on whether there was sufficient evidence that the individual met both *actus reus* and *mens rea* standards for specific crimes.[131] Yet, as discussed above, the *Flick* and *Krauch* tribunals found that the businesses engaged in the crime of enslavement – it was directly using slaves – even where individual business leaders were not held criminally responsible.

[127] *Krauch* (n 9) at 18.
[128] Ibid at 22-23.
[129] Ibid at 23.
[130] Annika van Baar, Corporate Involvement in International Crimes: in Nazi German, Apartheid South Africa, and the Democratic Republic of the Congo (Vrije Universiteit 2019) at 244.
[131] Michalowski, Bad Actor (n 122).

With spoliation, the *Krauch* tribunal noted that it was a German government policy to turn over to Germany companies property that was wrongfully taken as part of a war crime in order to benefit the German war efforts.[132] The Allied Control Council had found that I.G. Farben had 'committed' property violations, and the tribunal found 'that these offences were connected with, and were an inextricable part of, the German policy for occupied countries.'[133] What the court did not have cause to address explicitly was that by taking control of these properties, even absent any other effort, the German businesses were, at a minimum, participating in the war crimes.[134] This is common in complex environments. Van Baar studied three cases—Nazi Germany, apartheid South Africa, and the Democratic Republic of the Congo—and concluded that '[i]n all three contexts it was hard to do business and not become involved in the commission of international crimes by cooperating with the perpetrators of those crimes.'[135] As a result, and as is evidenced by the finding of criminal responsibility for only some of the business leaders who benefitted from the use of slavery or spoliation, business benefitted from serious violations of IHL and IHRL while also passively participating in those violations. Applying this reality to the framework in the UNGP, this suggests that in some contexts, businesses could not be merely 'linked to' a violation, but may be required to 'cause' or 'contribute to' IHRL and IHL violations. The context excuses individual criminal responsibility, and may excuse the business's remedial obligations, but the context also means that the business could not respect human rights.

3.2.2. South Africa's truth commission

Perhaps the most interesting engagement with the issue of business responsibility came from a special three-day hearing by the South African TRC, the main TJ mechanism employed following the end of apartheid.[136] In a footnote to his report on forms of complicity, Ruggie claims that the South African TRC 'implied that it would be

[132] *Krauch* (n 9) at 18-19.
[133] Ibid at 19.
[134] For a discussion on the relation between the rights to property and, *inter alia*, housing, food, and work, see Macchi, Van Ho and Yanes (n 39) at 14-17; Van Ho, Colombia (n 19) at 68.
[135] Annika van Baar, Corporate Involvement in International Crimes: in Nazi German, Apartheid South Africa, and the Democratic Republic of the Congo (Vrije Universiteit 2019) at 244.
[136] See, Charles P. Abrahams, 'Lessons from the South African Experience,' in Michalowski (n 15) 153 at 154.

inappropriate to hold … companies accountable for' merely benefitting from apartheid.[137] That is too simplistic a depiction to be accurate. The TRC's mandate sat between that of a judicial and non-judicial body as it was tasked with gathering and determining the truthfulness of testimonies in order to recommend amnesties, but without the ability to convict perpetrators or award reparations.[138] It was directed to investigate and create a historical record of the 'causes, nature, and extent of gross violations of human rights'[139] committed during the apartheid era, 'including the antecedents, circumstances, factors and context of such violations.'[140] The TRC was to identify 'all persons, authorities, institutions and organizations involved in' gross human rights violations.[141] This broad mandate encompasses the responsibility of legal persons, but the TRC could offer amnesties only to natural persons who had rendered 'a full disclosure of all the relevant facts relating to' their participation in gross human rights violations.[142]

The TRC mixed moral and legal approaches, routinely employing the words 'moral' and 'morality' while also using language that evokes a legal standard, such as the finding that certain businesses 'must be held accountable.'[143] In its report, the TRC encouraged victims of some businesses to pursue civil remedies that the TRC itself could not order.[144] This mix of morality and legality is unsurprising: the TRC was led by Archbishop Desmond Tutu and tasked with helping to shepherd the state from a situation in which the law was designed to sanction, protect, and promote systematic violations of IHRL to a situation where it was remedying those violations. It struggled to reach consensus and was hampered by political maneuvering,[145] but in its conclusions, the TRC's differentiated degrees of responsibility move beyond simple social expectations and into the territory of legal formation and recognition. Rarely focused on specific businesses, it instead primarily addressed industries, establishing three levels of involvement. Third-

[137] Complicity Report (n 51) at n 23.
[138] Promotion of National Unity and Reconciliation Act 34 of 1995,
[139] Defined in the mandate as 'killing, abduction, torture, or severe ill-treatment' and 'any attempt, conspiracy, incitement, instigation, command or procurement' of the same. Ibid at Section 1.
[140] Ibid at Article 3(a).
[141] Ibid at Section 4(a).
[142] Ibid at Section 4(c), 18(1), 20(2)(a)-(g).
[143] Ibid at para 23.
[144] See, Truth and Reconciliation Commission of South Africa Report, Vol. 6, Section 2 (1998) at 146.
[145] For a more complete overview of these issues, see, Dorothy C. Shea, *The South African Truth Commission: The Politics of Reconciliation* (US Institute of Peace Press 2000).

order involvement related to benefitting from apartheid, while 'first-order' refers to directly formulating oppressive policies or practices and 'second-order' involvement included financing the regime and selling it products or services with the knowledge they would be used for 'morally unacceptable purposes' that were lawful only because of the apartheid system. [146] Third-order involvement implicated, for example, white business owners were given privileged access to land, and consequently, enjoyed structural advantages over non-white owners.[147] They did not (necessarily) actively take part in the development of the policies, and instead merely operated within the system of laws.

In his 'complicity' report, Ruggie noted that the TRC found 'first-order' involvement to be of a 'different moral order' from 'third-order' involvement.[148] He used this to dismiss the TRC's findings as raising 'non-legal' complicity.[149] The TRC's findings on businesses that 'benefitted indirectly by virtue of operating within the racially structured context' was more nuanced:

> Condemning such businesses suggests that all who prospered under apartheid have something to answer for. … Taken to its logical conclusion, this argument would need to extend also to those businesses that bankrolled opposition parties and funded resistance movements against apartheid. Clearly not all businesses can be tarred with the same brush.[150]

A close textual reading suggests the TRC was merely rejecting a blanket application of responsibility to all who benefitted from the previous system. This does not mean that some of the businesses did not bear some responsibility to provide reparations for merely 'benefitting' from the region. In fact, the contrary is true. Quoting Professor Charles Simkins, the report notes that some businesses had attempted to push for reforms, while others 'resisted change.' [151] The former may have benefitted from the privileges of apartheid, but they did not seek or foster the environment necessary to sustain it.

The Commission also focused firmly on two industries, agriculture and mining. White farmers benefitted from privileged access to land and were also given control over the 'living and working conditions, wages, and the lives of black workers and their families

[146] Truth and Reconciliation Commission of South Africa Report, Vol. 4 at para 23-31.
[147] Ibid.
[148] Complicity Report (n 51) at n 23, citing TRC, Vol. 4 (n 149) at para 23.
[149] Ibid.
[150] TRC, Vol. 4 (n 149) at para 32.
[151] Ibid at para 139.

living on the farms.' [152] The forceful displacement of black South Africans from commercial farmlands 'was done, if not at the explicit request of the agricultural sector, certainly with its implicit support.'[153] Similarly, the mining industry 'benefitted from' legal systems that allowed for 'migratory labour and the payment of low wages to black employees.'[154] It is simply not the case that all businesses that were merely 'benefitting from' or prospering as a result of apartheid were treated equally by the TRC. The singling out of these sectors suggests that the TRC found some beneficial relationships more problematic than others.

The TRC stopped short of determining criminal responsibility for businesses as it was not empowered to order businesses to provide remedies. Instead, it explained the rights of victims to redress and issued recommendations about who should contribute to reparations efforts. This again led to a mixture of legal and moral conclusions. The TRC frames the right of victims to reparations within the context of IHRL's legal standards,[155] but could only request that businesses contribute to the reparations fund.[156] It called on all businesses that benefitted from apartheid to contribute to the fund, and indicated that taxes and fees on all wealthy businesses and corporations would supplement the donations.[157] Ultimately, the government of Thabo Mbeki rejected the proposal for taxes and fees, and instead used a voluntary Business Trust to collect donations.[158] The R$1.2 billion (USD $78million) collected (from only 140 companies) was then used for collective development projects rather than reparations.[159]

3.2.3. East Timor's truth commission

Several other truth commissions have called on businesses and business leaders to contribute to reparations funds as a means of compensating victims of past IHRL and IHL abuses,[160] but often with less thorough analysis than what appeared in the South African

[152] Ibid at para 44.
[153] Ibid at para 46.
[154] Ibid at Chpt 2, para 165.
[155] TRC, Vol. 6 (n 155) at Section 1..
[156] Ibid at 318-319.
[157] Ibid.
[158] See, Sandoval and Surfleet, 'Corporations and Redress in Transitional Justice Processes,' *in* Michalowski (n 15) at 93, 101.
[159] Ibid.
[160] Ibid at 100.

report. Sometimes the call for reparations has been a general one, but at other times, as with the Commission for Reception, Truth and Reconciliation ('CAVR') in East Timor, particular businesses or industries are identified as having a responsibility to contribute to reparations efforts.[161] For example, the East Timorese were forced to cultivate coffee but did not accrue benefits from the cash crop.[162] Coffee plantations were also used as grounds for interrogations, torture, and extrajudicial killings.[163] CAVR determined specifically that the coffee industry should pay reparations, and more broadly recommended that any businesses that 'profited from the sale of weaponry to Indonesia during the occupation … and particularly those whose material was used in Timor-Leste [should] contribute to the reparations programme for victims of human rights violations.'[164]

3.2.4. Colombia's land restitution

Finally, Colombia adopted a land restitution process that implicitly addresses beneficial relationships.[165] Aimed at returning individuals displaced due to the conflict,[166] the Colombian law allows for a burden shifting that presumes certain transactions were unlawful because of when and where they occurred or who was involved.[167] The law does not apply to the whole of Colombia, but targets places and periods of activity where forceful land transfers or displacements were common.[168] Those who benefitted from land transfers by securing land cheaply, including businesses and business leaders, can retain their property only if they can show they acted in good faith.[169] This requires demonstrating not only that they paid for the property but also that they paid a fair market price for the property.[170] In other words, the businesses that benefitted from widespread displacement were presumed to have engaged in wrongdoing and could only retain their property if they

[161] See, Chega! The Report of the Commission for Reception, Truth and Reconciliation in East Timor, Part XI, at para 1.7.
[162] Ibid, Vol. III, 148.
[163] Ibid, Vol. II, Par 7.2, pg 1081, para 824, pg 1119, para 897(5).
[164] Ibid, Part XI, at para 1.7
[165] *Ley de Víctimas y Restitutción de Tierras*, Ley 1448 de 2001) (junio 10). For an overview of the law and situation and its application to businesses, see, Van Ho, Colombia (n 19).
[166] Van Ho, Colombia (n 19) at 62.
[167] David L. Attanasio and Nelson Camilo Sánchez, 'Return within the Bounds of The Pinheiro Principles: the Colombian Land Restitution Experience' (2012) 11 *Washington University Global Studies Law Review* 1 at 24.
[168] Van Ho, Colombia (n 19) at 69-70.
[169] Ibid.
[170] Ibid.

could demonstrate they did not, in fact, benefit because they paid what would have been demanded from them otherwise.[171]

3.4. Conclusions

As mentioned above, this is not an exhaustive overview of the findings from TJ mechanisms. Instead, it focused on those findings that raise particular considerations about the way an overarching context can inform the responsibility of businesses and business leaders. In the next section, I identify some of the lessons these TJ mechanisms offer BHR.

4. Lessons for Business and Human Rights

The findings from TJ mechanisms discussed above lead me to three conclusions: first, BHR needs to better engage with standards from the so-called 'Global South;' second, TJ offers BHR important opportunities and guidance that international criminal law does not and cannot; and third, complex environments offer challenges for BHR that the UNGP do not seem capable of tackling. In this section, I discuss each of these issues.

One lesson that should be apparent from the discussion above, but which deserves more attention than can be given in this Chapter, is that the development of the UNGP could have benefitted from more engagement with standards emanating from outside the UN's 'Western Europe and Others' ('WEOG') regional group and from TJ. The foundation of the participation terms seems to have been informed primarily by international criminal law and US and UK law. The South African TRC's findings were noted but were not engaged with. The portrayal of their findings as merely moral, and not legal, downplays their significance, and the failure to engage with other TJ mechanisms (or civil or criminal law) from non-WEOG states perhaps contributed to the fact that UNGP fails to raise or answer compelling legal questions implicated by the use of the participation terms.

The second lesson to be drawn is that TJ should play a greater role in BHR discussions. To inform the UNGP's legal standards, Ruggie drew on international criminal law, but not TJ. This was a mistake. TJ could have provided clarity for issues that

[171] There are additional conditions so that if they made material improvements to the land, the purchaser could retain the property. These conditions raise questions about the appropriateness of this approach that are beyond the scope of this Chapter.

international criminal law is simply ill-suited to address. TJ mechanisms generally apply IHRL and some have addressed businesses specifically, whereas no international criminal tribunal has had jurisdiction to prosecute businesses for international crimes.[172] International criminal law is also intentionally narrow, focusing on only a few rights and a few types of actions.[173] The *Flick*, *Krauch*, and *Krupp* decisions found that businesses participated in violations of IHRL and IHL for which no individual business leader could be held accountable. Expanding research on international 'accountability' mechanisms beyond criminal trials, and even beyond judicial measures, can offer BHR new insights into the conduct expected of businesses.

Finally, the TJ findings raise questions about the limits of the UNGP in complex environments. The Guiding Principles treat the responsibility of businesses to respond to harms caused by others in relational terms: businesses should consider how to mitigate harms if they are caused by their business relationships via their operations, products, or services.[174] When determining how to respond to harms the business is directly linked to, it should consider using 'leverage,' which is a relational term.[175] In doing so, it can consider as well as 'how crucial the *relationship* is … and whether terminating the *relationship*' can have adverse impacts.[176] But, what if it is not the relationship but the context that is the problem?

As with active support, TJ mechanisms found that a beneficial relationship might give rise to a responsibility to provide reparations under the UNGP, but the context might require excusing the business's failure to respect human rights. As such, even where the business is passive it can participate in, cause, or contribute to human rights impacts. The post-war tribunals indicated German businesses directly undertook violations of IHRL, using slaves in their operations or benefitting from spoliation. While the criminal responsibility of the business leaders was excused, by the UNGP standards the businesses 'caused' or 'contributed to' the violations and should have a responsibility to provide

[172] The Special Tribunal for Lebanon's Appeals Panel has held businesses in contempt of court. See, Nadia Bernaz, 'Corporate Criminal Liability under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon,' (2015) 13 *Journal of International Criminal Justice* 313
[173] See, Rome Statute of the International Criminal Court, 2187 UNTS 90 (1998) at Articles 5-21; for a fuller discussion on the differences in regimes, see, Darcy (n 23) at 439-443.
[174] UNGP (n 2) at Principle 19, Commentary.
[175] See, ibid at 14, 19, Commentary.
[176] Ibid (italics added).

remedies. The South African TRC seemed to call for a nuanced approach to legal liability, suggesting that even certain beneficial relationships can give rise to a remedial responsibility.

Despite this, the TJ mechanisms for Germany, South Africa, and Colombia found or were designed around the recognition that the context, not merely a business's conduct or relationships, can impact a business's responsibility. The courts found the Germany business leaders could not avoid participating in war crimes without suffering punishment. The South African TRC recognized that all businesses operating in the apartheid context were, at least, linked to the human rights harms and incurred a responsibility to contribute to reparations, even if their actions did not reach the level of active participation in the IHRL violations. Finally, the Colombian law suggests that the context in which a business operates can create a presumption of involvement in human rights impacts that can be overcome only by a clear showing that the business did not participate in the harms.

These findings are crucial as it suggests that in certain contexts, the state's failure to respect, protect and fulfill human rights not only *allows* a business to negatively impact on human rights but it actively *requires* the business to do so. While necessity, duress, or similar defenses may justify excusing individual criminal liability for participating in these crimes, an outstanding question is whether it is equally appropriate to excuse the business's responsibility to respect and remedy impacts it participates in. The UNGP seems to suggest the answer is no: when a business causes or contributes to the impact, it bears responsibility to remedy that impact. Human rights due diligence might mitigate liability, but the responsibility to remediate exists unless the business's operations were only 'directly linked to' the violation. Yet, in these operational environments, the business responsibility to respect cannot meaningfully operate independently of the state. The business cannot be merely 'directly linked to' a violation. Operating in these environments required active participation in gross and serious violations of IHRL and IHL.

The experiences in TJ also indicate that the context is a factor not only for beneficial relationships, but sometimes for active engagement in crimes. The tribunals in Germany excused individual criminal liability for engaging in the use of slave labour, finding that the overarching context required defendants' active participation. On the other hand, individuals were convicted of crimes when they failed to mitigate their involvement by

taking unnecessary advantage of the context. Similarly, the Colombian government's land restitution process, and CAVR's conclusions on the responsibilities of coffee and military businesses, similarly suggest that in situations of widespread and systematic violations of IHRL and IHL, the context may encourage businesses to take advantage of violations but it need not necessarily cause those violations. Finally, the nature of the South African apartheid regime meant that even those who merely benefitted from apartheid were expected to contribute to or participate in reparations efforts. This suggests that even passive involvement can incur some responsibility when the context is so oppressive that merely benefitting from violations also works to sustain them. This is echoed by the findings of those who have examined BHR in occupied Palestine.

Finally, the experiences in TJ also suggest the limitations of relying on context to excuse a business's conduct. Argentina's *junta* engaged in widespread and systematic human rights violations, and businesses contributed to these violations. Yet, as with some of the Second World War cases, it was not the context that caused the business to engage with the violations. Instead, individual business leaders voluntarily supplied the military with names, equipment, food, and detention space. One could imagine a different finding by the Argentinian court if the military had forced the Ford leadership to engage in these crimes. This indicates that while some 'complex environments' create conditions within which the only means for a business to respect human rights is to leave the environment, not all complex environments require this. Similarly, the Nazi regime's approach to enslavement and spoliation excused the responsibility of some business leaders, but others were convicted specifically because they willingly and knowingly furthered those violations beyond what the context required.

In the discussion above, I did not need to consider how the severity of the activity might have impacted on a business's responsibility. Yet, it is worth noting that in some circumstances, businesses might have only been 'directly linked to' a violation, but the context involved severe violations that took place over a long duration that meant the businesses likely slid from along the UNGP continuum from 'directly linked to' to 'contributing to' the violations. This is perhaps clearest in the case of the South African and Colombian land displacements. The severity and duration of apartheid in South Africa, and the context of widespread and systematic displacement through the commission of war

crimes in Colombia, heightened the responsibility of businesses operating in those contexts. Where they might have only been 'directly linked to' to the displacements in another context, the knowledge of severe IHRL and IHL violations suggests their presence 'contributed to' the violation.

The problem with complex environments requires greater nuance than is provided in the UNGP. Seeking that nuance raises uncomfortable questions. The UNGP suggest that businesses operating in complex environments need only refrain from 'exacerbat[ing] the situation.'[177] But should this apply in contexts where the business's presence means it is participating in–causing or contributing to–international criminal violations of IHRL and IHL, such as the use of slavery? While the context might excuse criminal responsibility, the UNGPs are framed around the lower threshold of a responsibility to respect human rights, meaning that all businesses are to refrain from harming human rights. In some complex environments, it appears the only way to do this is to leave the context. Yet, there are many small- and medium-sized enterprises indigenous to a context who cannot easily leave it. Forcing them to do so could limit economic opportunities for individuals and communities that are already in situations of vulnerability. It could also embolden regimes to monopolize economic opportunity in a manner that exacerbates an already difficult human rights situation. This would be contrary to the clear purpose of recognizing an independent business responsibility to respect human rights. One answer is therefore to excuse business failures to respect human rights in complex environments where they are required to participate in IHL and IHRL violations. This calls into question the claim that the responsibility to respect is the minimum threshold and expectation in all contexts. The alternative explanation, equally distressing, also carries with it the potential to undermine the UNGP's status as the field's current lodestar: perhaps it is inappropriate to expect all business to be equally bound by the UNGP at all times. While the UNGP allow for factors such as size to dictate the extent of business's human rights due diligence or its response to harms it is 'directly linked to', the Guiding Principles still express a responsibility on all businesses to respect human rights at all times regardless of context. The strength and significance of this claim has directly impacted the current debate over the binding treaty. The remit of the treaty discussion was originally limited to transnational enterprises; the

[177] UNGP (n 2) at Principle 23, Commentary.

July 2019 'Revised Draft,' however, expanded the treaty's impact to include all businesses.[178]

In complex environments, applying the UNGP equally to businesses that are indigenous to the context and those that intentionally enter into it from outside seems ill-advised. The former cannot be faulted for choosing the context in which it operates, although they may need to take measures within their control to limit their contributions. The latter, however, often have a clear choice as to whether they continue operations or shift to other engagements. This suggests that the UNGP's understanding of the factors that a business should consider when determining how to respond to violations it is 'directly linked to' is incomplete; 'opportunity' or 'control' may be better indicators than 'leverage' in such circumstances. The complexity of this issue calls for interdisciplinary research on the political, social, and economic impacts of adding nuance to the UNGP.

5. Conclusion

In this Chapter, I used the experience of TJ to inform the BHR approach to the business responsibility to respect. The findings of TJ mechanisms suggest that at times, the UNGP's relational approach to the responsibility to respect is inappropriate. In a complex environment, the context, rather than individual relationships, can require a business to 'cause' or 'contribute to' IHRL or IHL violations. In some circumstances, the business might have only been 'directly linked to' the violations but the severity and duration of these violations leads it to slide along the continuum to 'contribute to' the violations. Under the UNGP, this triggers a responsibility to provide remedies. It is unfortunate that this is one of the first scholarly pieces to use TJ to examine the appropriateness of the UNGP's expectations, and the first to do so when considering the particular issue of businesses operating in complex environments. While there have long been complaints about the UNGP's approach to complex environments, these complaints have generally suggested that the UNGP do not go far enough in holding businesses accountable or giving them advice on operating in situations of armed conflict.[179] There have also been complaints,

[178] See above (n 20).
[179] See, e.g., Paul and Schönsteiner (n 14).

often dismissed by specialists, that the UNGP are more difficult for small- and medium-sized enterprises to comply with.[180] It is only in introducing the experience of TJ mechanisms that the possibility arises that the UNGP asks too much of certain businesses operating in complex environments, but the burden stems not from the size of the company but its ability to choose the environment it operates in.

The findings in this Chapter suggest that greater engagement with TJ can enhance the discourse within BHR. After examining the approach of the UNGP to business's responsibilities to respect and remedy, I outlined the findings of several TJ mechanisms. In complex environments, businesses that can leave the context should. Yet, not all businesses can leave. National businesses are effectively unable to leave the context, but are also unable to avoid contributing to a violation. This conclusion led me to question whether the UNGP should be equally applied to 'all businesses' at all times and in all contexts. Greater scholarship is needed on this issue and the mere act of admitting that the question exists is itself a contribution, leaving me hesitant to proffer a firm answer. I offer two alternative answers, both of which call into question the universality of the UNGP and nether is particularly satisfying: either BHR excuses violations of the responsibility to respect that occur in complex environments where the business is required to participate in IHRL and IHL violations, or the field recognizes that the UNGP do not equally apply to all businesses at all times. Of these, I must hesitantly endorse the latter option. Recognizing that some businesses cannot, in some contexts, comply with the responsibility to respect human rights accurately reflects the findings of TJ mechanisms without justifying all ongoing business activity in complex environments. This approach should encourage businesses to consider their power, control, and specific human rights impacts, and to adopt 'conflict-sensitive business practices' to mitigate their impacts.

[180] In comments to the Luxembourg Ministry of Foreign Affairs, Dorothée Baumann-Pauly dismissed these concerns by noting that, in her experience, many small- and medium-sized enterprises comply more fully with the UNGPs, and struggled primarily with learning how to report their efforts accurately and completely.