Corporate Due Diligence in post-conflict settings: the role of civil society and victims in advancing environmental and human rights protection in Colombia*

DILIGENCIA DEBIDA DE LAS EMPRESAS EN SITUACIONES DE POSCONFLICTO: EL PAPEL DE LA SOCIEDAD CIVIL Y LAS VÍCTIMAS EN EL AVANCE DE LA PROTECCIÓN DEL MEDIO AMBIENTE Y LOS DERECHOS HUMANOS EN COLOMBIA

Marta Paricio Montesinos
Faculty of Law and Helsinki Institute of Sustainability Science (HELSUS)
University of Helsinki, Finland
marta.pariciomontesinos@helsinki.fi

Abstract: Recent years have seen a rising consensus to hold corporations accountable for their human rights abuses in conflict-affected zones. This is represented by the concept of heightened due diligence, mainly based on the UNGPs. However, there is a lack of scholar literature on this topic. This paper focuses on the state of Colombia, analysing its performance under its duty to protect and how, in the face of its absence, civil society and victims fight for ending business impunity. Their actions and limitations pose questions regarding the due diligence international framework's premises and what is expected of a weakened state.

Resumen: Recientemente ha aumentado el consenso para responsabilizar a las empresas por sus abusos en derechos humanos en zonas afectadas por conflictos. Esto está representado por el concepto de diligencia debida reforzada, basado principalmente en los UNGP. Mas, falta literatura académica sobre este tema. Este estudio se centra en el Estado colombiano, analizando su desempeño en su deber de protección y cómo, ante su ausencia, la sociedad civil y las víctimas luchan por acabar con la impunidad empresarial. Sus acciones y limitaciones plantean interrogantes sobre las premisas del marco internacional de diligencia debida y lo esperado de un Estado debilitado.

Keywords: heightened due diligence, business and human rights, UNGPs, environmental protection, conflict affected zones, Colombia.

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Palabras clave: diligencia debida reforzada, empresas y derechos humanos, UNGP, protección del medio ambiente, zonas afectadas por conflictos, Colombia.

I. Introduction

Corporate responsibility is becoming a raising concern as major environmental destruction and human rights violations resulting from company activities are being reported, especially in high-risk zones. To address this, international legal efforts are erupting. The heightened due diligence framework, as part of the international Business and Human Rights discourse, is emerging as the key reference that informs state and corporate behaviour in conflict-affected areas. This concept, understood as a continuous process aimed at the identification, prevention, management, and mitigation of all possible impacts on human rights and on the environment throughout the businesses' entire supply chain, is mainly based on article 7 of the UN Guiding Principles on Business and Human Rights (UNGPs) (2011), the commentary 45 of the recently updated OECD Guidelines for Multinational Enterprises (2011), the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2013), and the UNDP guide on Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts (2022). Moreover, the proposed 2022 EU Directive for Corporate Sustainability Due Diligence is also expected to have an impact and make human rights binding to some extent.

The scholarly literature dealing with these situations has revolved around three topics: the macro-economic links between business, trade, and conflict[1]; the corporate liability in international humanitarian, international criminal law and human rights law focusing on companies' legal obligations[2]; and the Corporate Social Responsibility literature that examines the corporate impacts on society and initiatives to minimize those[3]. However, there is little literature deepening into different case studies analysing how conflict or post-conflict states both develop and implement national and international legislation and what role do victims and civil society play in this complexity.

Thus, through the analysis of the international and national framework, as well as court decisions and expert and civil society reports, this study aims to explore the regulatory responsibilities and performance of the state of Colombia in protecting human rights and how victims and civil society, far from the traditional perception of passive actors, actively advocate for the advancement of environmental and human rights protection within the context of business activities.

1 See e.g., Philippe LE BILLON, *Fuelling War: Natural Resources and Armed Conflicts*, New York: Routledge, 2013.

2 See e.g., Noam LUBELL, «Challenges in applying human rights law to armed conflict», *International Review of the Red Cross,* vol. 87, 2005; Salil Tripathi, «Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards», *Politorbis*, vol. 50, 2010.

3 Andreas GRAF and Andrea IFF, «Respecting Human Rights in Conflict Regions: How to Avoid the "Conflict Spiral" », *Business and Human Rights Journal,* vol. 2, 2017.

To do so, this paper is divided into three sections. First, I enumerate and analyse those principles and guidelines that encompass the international heightened due diligence framework and briefly expose its shortcomings. Secondly, I assess the Colombian state's adherence to its responsibilities under the international framework through both regulations and its implementation and discuss its deficiencies and what is needed. In the third section, I explore on one hand, the different ways in which victims and civil society, in face of the absences of the state, contribute to advance business accountability and human rights and environmental protection and, on the other hand, the limitations of their position and the moments in which there is an irremediable need for state action. Finally, some questions are raised, and conclusions are drawn.

II. The international heightened due diligence framework: development and shortcomings

Conflict and post-conflict situations pose greater significant regulatory difficulties for the State. These situations differ widely, involving state and non-state actors, like armies or guerrilla groups; varying ambitions, such as land disputes or obtaining resources; and underlying motivations, for instance, gaining profit or imposing an ideology[4]. However, despite the differences, these environments are usually characterized by a history of human rights violations, a business culture of high risk-high gain capitalist practices, weak or non-existent governmental regulation, and weak host state institutional structures to control the different non-state actors operating in the territory[5]. In addition, in post-conflict situations, the transition from violence to peace usually entails high environmental costs, as corporations interact with weak institutions and post-conflict countries guide their priorities toward restoration of socioeconomic conditions[6].

Therefore, since the risk of companies becoming involved in grave environmental destruction and human rights abuses is particularly high in contexts affected by armed conflicts and other situations of widespread violence, the regulation or, at least, the inclusion of these situations in Business and Human Rights international developments has been differentiated from situations of peace. These regulatory efforts to inform state and corporate behaviour in high-risk zones are encompassed in the so-called «Heightened Due Diligence», meaning the ongoing, proactive, and reactive process through which companies ensure their respect for human rights and do not contribute to conflict[7].

4 United Nations Development Programme, «Heightened Human Rights Due Diligence for business in conflict-affected contexts. A Guide», UNDP, New York, 2022, p. 7.

5 Olga MARTIN-ORTEGA, «Business and Human Rights in Conflict», *Ethics & International Affairs*, vol. 22, 2008.

6 Rachel KILLEAN, «From ecocide to eco-sensitivity: "greening" reparations at the International Criminal Court», *The International Journal of Human Rights*, vol. 25, 2020, p. 4; Andres SUAREZ, Paola Andrea ÁRIAS-ARÉVALO, Eliana MARTÍNEZ-MERA, «Environmental sustainability in post-conflict countries: insights for rural Colombia», *Environ Dev Sustain,* vol. 20, 2018.

7 OECD, «OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition», OECD Publishing, Paris, 2016, p. 13.

In that sense, the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) are the main authoritative and global framework guiding states and companies in preventing and addressing adverse business-related human rights impacts. These are divided into the well-known three pillars: the state's responsibility to protect, the businesses' responsibility to respect, and both businesses and states' responsibility to ensure victims have access to effective remedies. However, in respect to complex environments, the principles only contemplate in a separate *article 7* of the first pillar the state's responsibility of «supporting business respect for human rights in conflict affected areas»[8].

Likewise, the recently updated OECD Guidelines for Multinational Enterprises on Responsible Business Conduct of 2011, also included a specific commentary to its IV part on Human Rights, establishing that «in the context of armed conflict (…) enterprises should conduct enhanced due diligence (…)»[9]. Some years later, acknowledging that the extraction and trade of minerals was a main source of conflict and human rights abuses, the OECD released the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. This Guidance had the objective of helping companies respect human rights and avoid contributing to conflict through their mineral sourcing practices as well as cultivate transparent mineral supply chains and sustainable corporate engagement in the mineral sector[10].

More recently, the UNDP, together with the Working Group on Business and Human Rights, issued in 2022 a guide on Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts. This Guide, based on the UNGPs, aimed to provide stakeholders with a better understanding of the practical measures that should be taken to ensure responsible engagement from businesses in conflict-affect areas and give business parameters to design and implement heightened due diligence measures in these situations[11].

Finally, the proposed 2022 EU Directive for Corporate Sustainability Due Diligence is expected to have an impact and make human rights binding to some extent, also in conflict-affected areas. The amendments adopted by the European Parliament in the first reading on 1 June 2023 on the Commission's proposal included a new *recital 28 b* and a new *article 5-paragraph 2 b*, which would comprise the responsibility of companies and states to undertake heightened, conflict sensitive due diligence in conflict-affected and high-risk areas and respect obligations under human rights and international humanitarian law. Moreover, the new *article 13- paragraph 1 a*, would establish the need to issue clear and easily understandable guidelines that should provide support to companies or to Member State authorities on how companies should fulfil their due diligence obligations, including in conflict-affected areas[12].

8 United Nations, «Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework», UN, New York, 2011, p. 8.

9 OECD, «OECD Guidelines for Multinational Enterprises on Responsible Business Conduct», OECD Publishing, Paris, 2023, commentary 45, p. 26.

10 OECD (n 9), p. 3.

11 UNDP (n 6), p. 4.

12 European Parliament, «Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive» (EU) 2019/1937 (COM (2022)0071 – C9-0050/2022 – 2022/0051(COD)) (2)' (2023).

Of all these developments, the proposed EU Directive is the only one that is expected to have binding force. The UN and OECD principles and guidelines share the same non-legally enforceable nature, meaning that their observance is voluntary, and their implementation and enforcement depend on the willingness of states and businesses. As a result, according to some experts and scholars, only a small number of corporations have adopted these voluntary human rights standards[13].

Nevertheless, since the EU directive is still under preparation, the UNGPs remain the main reference and guidance for states, companies, and subsequent national and international regulations, even in conflict-affected contexts. Thus, the limited and general engagement of the UNGPs with complex environments is concerning, especially since most gross human violations and environmental destruction occur in these situations. Moreover, its framework and guidance seem to assume that, first, businesses can respect human rights regardless of the complexity of the context if they perform sufficient human rights due diligence, and second, that companies usually operate in ignorance or need assistance to comprehend how their actions and operations are connected to or contribute to environmental destruction or human rights violations[14]. Therefore, what is required is more information and engagement on their part. This educational and guiding spirit is common in all regulatory developments and seems to forget that companies are usually not unaware of their role; instead, they can usually benefit from the conflict[15].

These two misleading assumptions are significant and contradictory with the above-mentioned hypothesis of the regulation in these high-risk zones: since in complex environments the host state is either unable or unwilling to meet its duty to protect, the

13 For example, a study requested by the European Commission about Due Diligence Requirements through the supply chain concluded that only 16 percent of companies monitor human rights and environmental impacts across their entire value chain. See Lise Smit and others, « Study on Due Diligence Requirements Through the Supply Chain: Final Report», Publications Office of the European Union, Luxembourg, 2020; United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, July 16, 2018, UN Doc. A/73/163, at para. 27. See also Surya Deva, «From "business or human right" to "business and human rights": what next?» in Surya Deva and David Birchall (eds) *Research Handbook on Human Rights and Business,* Edward Elgar, 2020.

14 As already stated by several authors, the mere presence of a business in situations with widespread or systematic violations can affect, exacerbate, or condone gross or serious violations of IHRL and IHL. Therefore, some contexts require companies to leave the country in order not to engage in human rights abuses. As an example, some companies of the EU, such as the Swedish H&M, have begun the process of leaving Myanmar after the 2021 military coup. See also Tara Van Ho, « Business and human rights in transitional justice: challenges for complex environments» in Surya Deva and David Birchall (n 14); 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, p. 84.

15 In the Colombian context, it is notable the case, still in process, against the banana company Chiquita in the federal courts of the United States. The North American multinational Chiquita carried out, between 1997 and 2004, more than one hundred transfers to the paramilitaries for an amount equivalent to 1.5 million of euros to maintain the monopoly of the land and ensure the export of the product.

business responsibilities to respect and remedy become even more important[16]. The portrayal of companies as neutral agents or in need of constant guidance does not represent the reality of these contexts nor does it seriously consider the power imbalances between the different actors involved (host and home state, companies, armed groups, and local and indigenous population).

Taking both characteristics into consideration, the lack of legal binding force and its inappropriate depiction of power imbalances, it is doubtful that this heightened due can provide a comprehensive guide and properly inform states and business behaviour in conflict zones. What is more, this framework seems insufficient by itself as a tool for victims of human rights abuses or environmental destruction in conflict-affected areas to seek justice and reparations.

Nonetheless, some states affected by conflict have started to include these international developments in their national regulations, and courts have incorporated the due diligence concept in some of their decisions. Colombia is a good example.

III. Unwilling or unable: the state of Colombia and its responsibility to protect

As previously mentioned, the UNGPs establish the state's responsibility to protect (pillar 1) and to remedy (pillar 3) through all the legal and administrative options available[17]. Specifically, the responsibility to protect encompasses preventing, investigating, sanctioning and redressing. In this section, I will assess the Colombian state's adherence to its responsibilities through both regulations and its implementation.

In the case of Colombia, the context is highly influenced by the armed conflict that supposedly finalised with the Peace Agreements of 2016 with the oldest guerrilla in Latin America, The Revolutionary Armed Forces of Colombia (Las Fuerzas Armadas de Colombia, FARC). Nevertheless, the conflict persists through the history of the country, the land disputes, the State configuration, and the economic model of development established[18].

Yet, Colombia was the first non-European country in developing a National Action Plan for Business and Human Rights (NAP) in 2015 that covered a period of 3 years, and, in 2020,

16 Van Ho (n 15), p. 382.

17 Human Rights Council, « Protect, Respect and Remedy: a Framework for Business and Human Rights», A/HRC/8/5 (7 April 2008), paras. 18–22.

18 For example, since the beginning of the new millennium, successive governments of Colombia have turned mining and oil exploitation into the country's development engine. Often ignoring legal regulations and affected communities, this strategy has intensified social and environmental conflicts that focus on land ownership and use. Colombia is the country in Latin America where the highest number of conflicts of this type occur and where the most environmental defenders have been murdered in 2020. See Frédéric Thomas, «Estudio sobre el deber de debida diligencia en Colombia», CETRI, Brussels, 2022, available at <https://www.cetri.be/Estudio-sobre-la-diligencia-debida?lang=fr> last accessed 26 october 2023.

they officially announced the second NAP covering the period 2020-2022. Both national plans were configurated as a tool of public policy and had the main goal of guaranteeing that the State of Colombia adequately protects human rights and that business activities in Colombia are respectful of human rights and contribute to the sustainable development of the country. In that sense, the state of Colombia soon tried to incorporate the UN principles in its own national framework as part of its duty to protect human rights through policies and regulation relating to business operations[19].

In general terms, while public policies have been overshadowed in the human rights field by legislative measure and judicial interpretation, NAPs have been widely used by states of Europe and Latin America to incorporate the UNGP principles to their national framework[20]. So much so that the theoretical premises and substantive elements that NAPs should contain have been largely developed by the UN Working Group through its 2014 report and its 2016 guidance[21]. According to the 2014 report, the fundamental purpose of such policies is to prevent and strengthen protection against human rights abuses by business enterprises through an inclusive process of identifying needs and gaps and practical and actionable policy measures and goals[22]. In other words, assess what the States are doing to implement the UNGPs and identify the gaps which require further policy action.

In that sense, Cantú Rivera argues that NAPs become relevant tools to contribute to the performance of the existing state's duties under international law through, first, awareness-raising, and, second, implementation measures[23]. Thus, the effectiveness of a NAP can be measured by the success in interministerial awareness-raising that should translate into effective compliance of the state's human rights obligations and a successful horizontal policy coherence inside the Executive branch[24]. In addition, he adds, there are other potential elements to advance the implementation of the UNGPs through NAPs, not only related to the first, but to the third pillar. NAPs can address or contribute to remove practical obstacles to access to remedy, especially for state-based non-judicial mechanisms, and, at the same time,

19 Consejería Presidencial para los Derechos Humanos y Asuntos Internacionales, «Colombia Avanza. Plan Nacional de Acción sobre Derechos Humanos y Empresas», 2015, available at < https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/PNA_Colombia_9dic.pdf > last accessed 10 November 2023; Consejería Presidencial para los Derechos Humanos y Asuntos Internacionales, «Plan Nacional de Acción de Empresas y Derechos Humanos 2020/2022», 2020, available at < https://globalnaps.org/wp-content/uploads/2021/06/colombia-2020-2022-plan-nacional-de-accion-de-empresa-y-derechos-humanos.pdf > last accessed 10 November 2023.

20 Humberto Cantú Rivera, «National Action Plans on Business and Human Rights: Progress or Mirage?», *Business and Human Rights Journal,* 2019, p. 4.

21 General Assembly, «Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises», A/69/263 (5 August 2014); UN Working Group on Business and Human Rights, «Guidance on National Action Plans on Business and Human Rights», (Geneva: OHCHR, 2016).

22 General Assembly 2014 (n 22), paras. 2 and 6.

23 Cantú Rivera (n 21), p. 11.

24 ibid, p. 13; Larry Catá Backer, «Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All», *Fordham International Law Journal*, vol. 38, 2015, p. 457.

can improve and clarify the role and functioning of some non-judicial mechanisms, such as OECD National Contact Points[25].

Nonetheless, NAPs present grave and several challenges. Firstly, having a strong state-centred focus, NAPs only have effect on public officials from the Executive branch, but hardly upon the Legislature or the Judiciary of the State. Then, NAPs cannot generate vertical policy coherence and effectively regulate corporate conduct. In addition, this has negative effects in terms of enhancing business accountability since victims of human rights abuses will not be able to rely on these public policies alone as the basis for their legal arguments in a judicial process. Secondly, the lack of measurement in the implementation of public policies makes it difficult to assess that these NAPs are causing effective changes in state and business behaviour. Finally, NAPs have a limited time frame linked to political cycles and governments. Policies, priorities, and lessons learned can change or be lost in a matter of years[26].

In addition to these, the National Action Plans of Colombia present further challenges. On one hand, both contain general similar aims to achieve horizontal coherence and similar obligations for the different organs of the executive branch, with a constant use of the verbs «promote», «encourage» and «strengthen» and little specific measures or actions. On the other hand, the second NAP is composed of 70 pages with an extensive background on how Covid 19 has affected the economic situation of the country and how the State of Colombia has dealt with it. Having this as the main argument, there is a constant mention of the need of «economic reactivation» for Colombia and, through the text, this objective is sometimes placed before the obligation and need to respect human rights or the implementation of a sustainable economy[27].

Furthermore, considering the importance that the armed conflict has had and still has in the economic and social context of the country, it is interesting the decision in both national plans of not including a section on the links between the conflict and the role of corporations. Neither of the plans have a proper diagnosis on how corporations have contributed to the conflict or have taken advantage of it. The only reference to this link can be found in the second national plan when it states that the violence on the territory is an additional challenge that has affected the business activity[28]. However true, it completely forgets to mention the other side of the coin: how business activity has affected the conflict.

On that note, even though it is claimed that there was an active participation of civil society in the creation and development of the plans, several Colombian civil organisations opposed both. According to them, not only there was an absence of a proper diagnosis of the situation and the imbalance of power between actors, but also, an absence of real and effective participation of civil society and consultation processes. Moreover, they claimed that there was no guarantee that the State will comply with its obligations to protect human rights since the plans did not propose suitable specific tools for the comprehensive reparation of violations of human rights nor do they contemplate a preventive approach against them[29].

25 Cantú Rivera (n 21), pp. 14 and 17.

26 ibid, p. 15.

27 See «Plan Nacional de Acción de Empresas y Derechos Humanos 2020/ 2022» (n 20), pp. 6, 22, 24, 49.

28 ibid, p. 20.

29 See e.g., Ambiente y Sociedad, «Comunicado de la sociedad civil colombiana frente a la política pública sobre Derechos Humanos y Empresa del Gobierno de Colombia», 13 July 2016, available at

As a result, the effectiveness of NAPs, both Colombian and in general, has been questioned as they can be used as a mirage to avoid engaging in what is required from states and business to ensure the protection and respect of human rights[30]. Hence, it becomes crucial for state not only to concentrate on NAPs but also to pursue the development of comprehensive regulations accompanied by legal reforms, using the insights gained from NAPs and their gap analyses as a starting point.

However, this would require, first, that the NAPs acknowledge and conduct a proper analysis of the role of corporations in the Colombian context; second, a collaboration work between the different branches of the state as well as having a multi-stakeholder approach to ensure access to and consideration of the voices of all stakeholders; finally, show a proper commitment to human rights protection and sustainability in which the economic development is not placed as the first priority of the state. NAPs, then, could be considered not only a good tool for horizontal coherence between ministries and governmental bodies, but also an adequate foundation for a future due diligence law or legal reform.

Before concluding, it is worth noting that even though NAPs are the policy documents that directly deals with the UNGPs, there are regulations and jurisprudence that indirectly affect the obligations and responsibilities of companies in Colombia. On one hand, there is the regulation on environmental issues through the creation of the National Environmental System (Sistema Nacional Ambiental, SINA) through the law 99 of 1993, in which some businesses responsibilities in environmental issues are regulated, such as the evaluation of environmental impacts within the framework of environmental licenses. In addition, from a private perspective and through self-regulation, parties can ask and adopt contractual clauses that include obligations regarding human rights in the negotiation of commercial contracts.

On the other hand, through constitutional actions and sentences, the Constitutional Court has developed jurisprudence regarding the links between businesses activities and ethnic communities' rights. Linked to this, the deep participation of companies in serious human rights violations during the conflict has been addressed through transitional justice, for example in judicial decisions on land restitution[31]. Likewise, in the regional system, the Inter-American Court of Human Rights has reinforced and increased the standard of protection and investigation by States in relation to third parties that commit human rights violations in their jurisdiction. Finally, it is also important to mention that even though the establishment of the OECD National Contact

<https://www.ambienteysociedad.org.co/comunicado-de-la-sociedad-civil-colombiana-frente-a-la-politica-publica-sobre-derechos-humanos-y-empresa-del-gobierno-de-colombia/> last accessed 30 October 2023; Mesa Nacional de Organizaciones de la Sociedad Civil sobre Empresas y Derechos Humanos, "Pronunciamiento público de las organizaciones no gubernamentales ambientales, sociales y de derechos humanos rechazando nueva versión del plan nacional de acción sobre empresas y derechos humanos", 15 december 2020, available at <https://media.business-humanrights.org/media/documents/MESA_EDH_Comunicado_PNA_-_10_diciembre_2020_n10homb.pdf> last accessed 30 October 2023

30 Cantú Rivera (n 21).

31 In this type of jurisprudence, the duty of companies to analyse the factors of the zones they are investing and not take advantage of the conflict has been highlighted. However, they do not still require any human rights due diligence process. See Nataly Sarmiento Eljadue and others, «Avances y Retos en la regulación de la debida diligencia empresarial en derechos humanos en Colombia», Fundación ideas para la Paz (FIP), Zuleta Beyond Borders, August 2021.

Point through Decree 1400 of 2012 and in line with the OECD guidelines is an important regulatory development that offers a flexible dialogue mechanism, there has been no important examples of conflict resolutions between companies and local population or victims, if any at all.

Considering the above and returning to the specific obligations of the state to protect under the UNGPs, some findings are highlighted. First, differently from the UNGPs that contain and explain several preventative measures, the national instruments only mention the obligation of preventing as a general and abstract national obligation, but do not contain any specific measures. Secondly, the national instruments do not contemplate any special sanction regime for companies in human rights issues nor exists any legal provision that allows to establish which authority is competent to sanction nor what kind of sanctions would apply.

On a slightly different note, the NAPs mentioned and structured the non-judicial mechanisms available to victims as well as made indirect reference to the possibility of undertaking legal reforms regarding the barriers to remedy and established a working group to study how to mitigate these[32]. In contrast, practice shows that the initiative to investigate human rights violations by the state of Colombia is limited, if not completely absent[33]. Regardless of the duty of the State of Colombia to conduct effective and diligent investigations, these only occur when victims decide to resort to legal or state mechanisms that allow the protection and reparation of human rights violations[34]. So much so that impunity regarding human rights violations in relation to business activities as well as in general, is usually attributed to the lack of will of the state to investigate and sanction.[35] This creates what is called a symbolic effect of permissiveness and allows protecting the continuity of the economic model imposed in the region[36]. Thus, it is possible to assert that the State of Colombia still has a long way to go to fulfil its role as a guarantor of human rights. As best summarized by the words of Alan Seagrave, Colombia «talks the talk» but does not «walk the walk»[37].

IV. Beyond passive actors: the active role of victims and civil society in the advancement of business accountability

While there was a brief period of reduced violence following the 2016 accords, it proved to be short-lived[38]. In fact, in its report of 2020, INDEPAZ determined the existence of a continuous,

32 Nevertheless, there was no commitment to undertake those legal reforms because of the adoption of the NAP. See «Plan Nacional de Acción de Empresas y Derechos Humanos 2020/ 2022» (n 20) p 44-45.

33 Sarmiento Eljadue and others (n 32), p 32.

34 ibid.

35 See e.g., CPDH, «Comunicado N.7 del 2016», 21 November 2016, available at < https://www.colectivodeabogados.org/?El-CPDH-rechaza-la-oleada-de-crimenes-y-agresionesselectivas-y-sistematicas-en > last accessed 26 october 2023.

36 Thomas (n 19), p. 42.

37 Alan Seagrave, «Conflict in Colombia: How Can Rebel Forces, Paramilitary Groups, Drug Traffickers, and Government Forces Be Held Liable for Human Rights Violations in a Country Where Impunity Reigns Supreme», *Nova L Rev*, vol. 25, 2001, p. 525.

38 See e.g., Ivan Garcia, «Peace and Pesos: How Colombia's Peace Treaty is Impacted by its

systematic attack against Human Rights Defenders (HRDs) that increased in the post-accord period and disproportionally targeted indigenous, racialized, and gendered activists[39].

This post-war violence against defenders in Colombia is largely a rural phenomenon and, within the context of business activities, a group highly exposed is defenders of land and environmental rights, who are often from ethnic communities. Some examples are the indigenous people defending their rights to their territories and right to life, like the Wayuu or Ykpa; Afro-descendant and farmer communities («campesinos») demanding for a healthy environment, like the cases in La Salvajina o Hidroituango; and union and social organizations that face extractive project under the control of multinational corporations. In general, these three groups fight against economic interest related to large-scale agro-industry, forestry, energy, infrastructure investments and mining projects, licit and illicit[40]. Moreover, defenders involved in the restitution of lands disposed during the armed conflict are also affected by postwar violence[41].

While most of the post-war violence is attributed to organized armed and criminal groups, such as paramilitaries, it is worth noting that state authorities have played a huge role when public stigmatizing communities and defenders as well as carrying out illegal surveillance, unfounded criminal prosecutions, excessive use of force, and extrajudicial killings[42]. This was quite predominant in the Uribe government from 2002 to 2010 and its national strategy to show defenders as internal enemies that are allies of the guerillas or opponents of the resource-extraction-based economic development model and, therefore, of the Colombian public general interest[43].

In that sense, victims not only can struggle because of the absent role of the State but also its opposition. The public stigmatization of HRDs together with the prioritization of liberal practices as well as the inaction of the state to investigate human rights violations or sanction companies leaves victims and ethnic communities defenceless and in danger[44].

Developing Economy», Harvard International review, 2022, available at <https://hir.harvard.edu/peace-and-pesos/> last accessed 8 October 2023.

39 INDEPAZ, «Informe: Líderes y Defensores de Derechos Humanos», 2020, available at <http://www.indepaz.org.co/informe-lideres-y-defensores-de-derechos-humanos-21-de-diciembre> last accessed 14 November 2023.

40 See Amanda Romero and others, «Asimetrías, estrategias, y posibilidades del litigio estratégico en materia de derechos humanos en el contexto de las actividades empresariales», Centro de Información Sobre Empresas y Derechos Humanos, 2020, p. 9.

41 Philipp Wesche, «Post-war Violence against Human Rights Defenders and State Protection in Colombia», *Journal of Human Rights Practice*, 2021, p. 321.

42 Somos Defensores, «Más allá de las cifras. Informe enero-junio 2018: Sistema de información sobre agresiones contra defensores y defensoras de los DD.HH.- SIADDHH», 2018, available at <https://indepaz.org.co/wp-content/uploads/2019/08/M%C3%A1s-All%C3%A1-De-Las-Cifras-Somos-defensores.pdf > last accessed 10 November 2023.

43 Philipp Wesche (n 42), p. 320; Colectivo de Abogados José Alvear Restrepo, «Defender la vida. Informe a la Comisión de Esclarecimiento de la Verdad sobre patrones de agresión a personas que defienden Derechos Humanos y el territorio en Colombia», 2018, available at <https://www.colectivodeabogados.org/wp-content/uploads/2018/07/cajar_informe_presentacion.pdf> last accessed 10 November 2023.

44 For example, the government of Colombia promotes mining by assigning legal mining titles in order to drive economic development, including in Indigenous reserves in the Amazon. See Prada

However, contrary to the representation of victims of mass atrocities in international law as defenceless, passive and in need for external support[45], in Colombia exists a well-developed infrastructure of human rights organizations that historically coordinates the voices of victims and human rights defenders[46]. As expressed by Richard Georgi, «victimized Colombians are not envisioned as passive receivers of rights, but as active citizens for a new polity»[47], and several cases and studies prove this perception[48].

Likewise, with respect to human and environmental abuses within the context of business activities, I argue that victims and civil organisations advocate and push for business accountability and the protection of environmental and human rights through two main avenues.

On one hand, by organizing themselves, denouncing, investigating, and publicly exposing human rights violations, they have, to some extent, tried to compensate for the absence of state intervention and assume responsibilities typically attributed to the state. As previously stated, the state only initiates investigations when victims resort to mechanism of remediation, leaving Colombian and international organisations together with victims bearing the weight of investigating and denouncing human rights abuses[49]. In that sense, it is worth noting the creation in 2016 of the CSOs Human Rights Roundtable to address corporate power («Mesa por los derechos humanos frente al poder empresarial») during the government of Juan Manuel Santos. This initiative was formed after several organizations[50] decided to meet and manifest their concern regarding the first NAP. Together, these organizations have released several documents and pronouncements with analysis of policies and laws as well as demands to improve the legal and factual situation in Colombia. Separately, the organisations

Céspedes, «Defensores de los cerros sagrados», Agenda Propia, 2020, available at <https://www.connectas.org/especiales/defensores-cerros-sagrados/> last accessed 12 November 2023; Torsten Krause, «Reducing deforestation in Colombia while building peace and pursuing business as usual extractivism?» *Journal of Political Ecology*, vol. 27, 2020.

45 Nadia Tapia Navarro, «The Category of Victim "From Below": the Case of the Movement of Victims of State Crimes (MOVICE) in Colombia», *Human Rights Review*, vol. 20, 2019, p. 306.

46 See F. Richard Georgi, «Peace through the lens of human rights: Mapping spaces of peace in the advocacy of Colombian human rights defenders», *Political Geography*, vol. 99, 2022.; Thomas (n 19); Amanda Romero and others (n 41).

47 Georgi (n 47), p. 9.

48 See e.g., Tapia Navarro (n 46); Georgi (n 47); Cecília López Montaño and María-Claudia Holstine, «Rural women in Colombia: from victims to actors» in Kumudini Samuel, Claire Slatter, Vagisha Gunasekara (eds.), *The Political economy of conflict and violence against women: Cases from the south*, Zed books, 2019; Philipp Wesche (n 42); César A. Rodríguez-Garavito and Luis Carlos Arenas, «Indigenous rights, transational activism, and legal mobilization. The struggle of the U'wa people in Colombia» in Boaventura de Sousa Santos and César A. Rodríguez-Garavito (eds.), *Law and Globalization from below: Towards a Cosmopolitan Reality,* CUP, 2005; Diana Carolina Arbeláez-Ruiz, «Indigenous resistance to mining in post-conflict Colombia», *The Extractive Industries and Society*, vol. 9, 2022.

49 Sarmiento Eljadue and others (n 32).

50 Some of the organizations that promoted the initiative were: Centro de Estudios Jurídicos Tierra Digna, Corporación Colectivo de Abogados "José Alvear Restrepo", CINEP Programa por la Paz, FIAN Colombia; ILSA; Comisión Colombiana de Juristas. See more < https://www.ciedhcolombia.org/mesaedh> last accessed 13 November 2023.

that encompass the roundtable work for different causes. In this respect, organisations such as *Asociación Ambiente y Sociedad, ForumCiv* and *PAS* work, nationally and internationally, for the transition to peace and the creation of civil participation forums; *Comisión Colombiana de Juristas* (CCJ), *AIDA* and *ILSA* are organizations that work from a legal perspective to study the national and international law and provide analysis to governments or legal aid to victims; finally, some regional organisations like *Fuerza de mujeres Wayúu, PCN, Comité por la defensa del agua, la vida y el territorio del Cauca* and *Mesa ambiental de Jericó* work in specific cases investigating the human rights abuses and the environmental damage of corporations in different territories as well as raising awareness of that situation nationally and internationally[51]. Another example worth mentioning is the proposal of some human rights defenders to create a regional strategic litigation network of experienced lawyers and organizations, aimed at strengthening defence, litigation and counterclaim processes, as well as changing narratives in the region and, thus, effectively confront abuses by companies and face the absence of the State[52].

On the other hand, victims and organisations, when accessing to non-judicial and judicial mechanisms with a vindicative discourse of peace, environmental protection, and human rights, not only contest the liberal and traditional understanding of these, but also push the boundaries of judicial argumentation. In this regard, human rights defenders advocate for peace not only in terms of armed confrontation, socio-political violence and state abandonment, but also for a structural transformation of economic, ecological and epistemic foundation of the historic Colombia[53]. As a representative example, we have the Manifiesto of the Colombian Women for Dignitiy and Peace that concludes that peace and human rights includes economic-ecological alternatives to neoliberal capitalism[54].

This vindicative discourse of human rights is also portrayed in legal arguments when accessing to courts and, paraphrasing Cesar Carvajal, former auxiliary magistrate of the Colombian Constitutional Court and current auxiliary magistrate of the Special Jurisdiction for Peace (JEP), mobilizing before the courts and structuring a strong human rights discourse led and allow the judges to move beyond the limits of the construed legal language and extend the constitutional imagination[55]. Carvajal exemplifies this collaboration with Constitutional Court decisions on environmental issues that, to him, are «born from the paradox between the spontaneity of the mobilization and the procedural rigidity of litigation»[56].

51 See more, CIEDH, «Memorias de la Mesa de organizaciones de la sociedad civil sobre empresas y derechos humanos», 2021, available at: <https://www.ohchr.org/sites/default/files/2021-11/MESAInforme_Mesa_VC5.pdf> last accessed 13 November 2023.

52 Dora Lucy Arias in Romero and others (n 41), pp. 36-39.

53 See e.g, Georgi (n 47), p. 8

54 Mujeres Colombianas por la dignidad y la paz, 'Manifesto', 14 May 2013, available at <https://humanas.org.co/alfa/dat_particular/ar/caquetamanifiestomujeres.pdf> last accessed 10 November 2023. See among others, ANZORC, 'La paz de los campesinos es la justicia social', 18 December 2012, available at <https://prensarural.org/spip/spip.php?article9845> last accessed 10 November 2023; ONIC, 'Comisión Étnica para la Paz y la Defensa de los Derechos Territoriales', 8 March 2016, available at <https://www.onic.org.co/noticias/976-comunicado-a-la-opinion-publica-comision-etnicapara-la-paz-y-la-defensa-de-los-derechos-territoriales> last accessed 10 November 2023.

55 César Carvajal Santoyo in Romero and others (n 41), pp 25-30.

56 César Carvajal Santoyo, «Dos modos de caminar el ambiente», in María Victoria Calle Correa,

The Constitutional Court's Sentence SU-123 of 2018 is a representative case that portrays that dynamic and pushes for the respect of human rights and the environment within the context of business activities. Specifically, the case concerns the tutela/protective action («acción de tutela») filed by the indigenous community Awá la Cabaña against the Ministry of the Interior, the National Environmental License Authority («ANLA») and the company Consorcio Energy regarding the oil extraction project in the zone known as Puerto-Vega Teteyé that began in 2009. The indigenous community argued the project started and was granted the environmental licence without conducting a process of prior consent with them and the affected communities. According to them, the project caused damage to health, living conditions and the territory, and contaminated the river San Lorenzo affecting their food sources as well as the ancestral life practices, such as teaching traditional medicine. In addition, since the National Army appeared to protect the oil infrastructure, armed conflicts and stigmatization of the indigenous people started.

Before arriving to the Constitutional Court, the case was brought by the Cabildo's governor to the Superior Tribunal of Mocoa, which denied the protection action. Then, the decision was challenged before the Supreme Court of Justice, which also concluded that there was no violation of the rights of the indigenous community. For its part, the Constitutional Court decided in 2018 to revoke the decisions made by the other two courts, concluded that several of the Awá La Cabaña Community's fundamental rights had been violated and granted the community the rights to prior consultation, healthy environment, health, and food security and sovereignty[57]. Moreover, apart from ordering the related public authorities to take several actions, the ruling establishes that the prior consultation of indigenous peoples and afro-descendant communities is part of the duties of due diligence to respect human rights of not only the State, but also companies. Thus, together with this decision, the Constitutional Court has been establishing and clarifying due diligence responsibilities and voluntary sanctions for companies in several decisions[58].

Nevertheless, despite the active role of civil society and the advancement through court decisions, there are some factors that pose questions and must be considered regarding, on one hand, the need and position of the state and, on the other, the due diligence concept and framework.

In the first place, although these decisions based on mobilization have an immense symbolic and political value, they are not enough by themselves: the state needs to implement the decisions and conduct the actions required in them[59]. Furthermore, this dynamic between civil society and courts is an exception in Colombia that corresponds to the constitutional regime, not the ordinary judicial system. In other words, in Colombia the exceptional judicial mechanism works well, but the ordinary justice present great challenges and problems[60].

Gloria Patricia Lopera Mesa, César Carvajal Santoyo, «El vínculo indisoluble entre democracia y derechos ambientales», Ideas verdes, Fundación Heinrich Böll, Colombia, vol. 23, 2020, p. 12.

57 Corte Constitucional de Colombia, Sentencia SU-123/2018.

58 See also Corte Constitucional de Colombia, Sentencia T-693/2011 (*Achaguas-ODL*); Sentencia C-674/ 2017. See more in Sarmiento Eljadue and others (n 32).

59 Dora Lucy Arias and César Carvajal Santoyo in Romero and others (n 41), pp. 25-39.

60 Comisión Internacional de Juristas, «Acceso a la Justicia: Casos de Abusos de Derechos Humanos por Parte de Empresas», CIJ, 2010, available at <https://www.icj.org/wp-content/uploads/2012/09/Colombia-access-to-justice-corporations-thematic-report-2010-spa.pdf >last accessed 10 November 2023.

For example, investigators sometimes cannot access the places of events, prosecutors lack resources and are usually unable to respond to the legal capabilities of the lawyers of companies, and, during the investigations it is not unusual that prosecutors are threatened or intimidated, so the fear of reporting or collaborating in investigations against companies is still latent[61].

Similarly, victims encounter several legal and practical barriers when trying to access justice that have been extensively reported. The burden of proof, the difficulties in proving their claims due to the absence of the state and the gaps in official documentations, the lack of economic resources to even hire a lawyer and the absence of rights awareness and trust in public institutions are some of the main examples[62].

As a result, it is not surprising to find an apparent clash between demands of human rights defenders in respect to the state of Colombia. While they still address their demands to the state and contemplate it as the figure that must protect human rights, they also question its legitimacy and advocate for the decentralization and diversification of the political power through the inclusion of civic participation, territorial self-determination, public deliberation, and protest[63].

Secondly, although the Constitutional Court has included the due diligence framework in its reasoning, Colombian organizations seldom use it, if at all[64]. The concept of due diligence is relatively little known among Colombian organizations mainly because of the gap that exists between the theoretical development of the concept and its real effectiveness[65]. Moreover, some Bogotá-based NGOs dismissed the UNGPs because of their non-binding nature and the process outside of the local context. On one hand, they perceived the UN document as having an economic rather than legal nature, asserting that its implications allow corporations to use it as simple marketing[66]. Besides, the development process of the UNGPs was argued to be too international and elitist[67].

The fact that victims and civil society push for the advancement of business accountability without necessarily resorting to the UNGPs or the concept of due diligence, obliges us to revisit the first and second section of this paper. Internationally, the scepticism regarding the UNGPs raises questions in respect to what format and which content the international principles, the future EU directive as well as a possible future binding treaty should take and include

61 ibid, pp. 54-56.

62 See e.g., ibid; Romero and others (n 41); Oxford Pro Bono Publico, «Obstacles to Justice and redress for victims of corporate human rights abuse», 2008, available at <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf> last accessed 13 November 2023.

63 Georgi (n 47), p. 9.

64 For instance, although the Constitutional Court used the concept of due diligence, the demands of indigenous people are mainly based on the constitutional rights guaranteed to them in the Colombian Constitution.

65 Thomas (n 19), p. 8.

66 Laura Dominique Knöpfel, «Contesting the UN Guiding Principles on Business and Human Rights from Below», Working Paper 4/2017, Swiss Peace, 2017.

67 ibid; Magali Bobbio, Luciana Cumpa García Naranjo y Mario Urueña Sánchez, «Algunas reflexiones sobre la doctrina de la responsabilidad de proteger», *REDIC*, vol. 2, 2019.

to inform states and business behaviours as well as be seen as a useful tool for victims. These questions are, among many others: which are the aims and limits of international regulation, especially related to conflict affected contexts? What political and economic premises are informing these international developments? Is it necessary to engage with the local perspectives and include a case-by-case approach? Who is present and who needs to participate in the decision-making processes? Are all voices and power imbalances between those being considered? What should be expected from businesses in these contexts? And, more specifically, what is expected from a weakened state that, even though currently has a more progressive government, does not control all the territory, lacks capacity building and resources for its civil servants, investigators, and prosecutors, tries to prioritize economic development and has been historically linked to and influenced by political and economic elites[68]?

Nationally, apart from structural changes that the state needs to address —the possible decentralization of power and the lack of control in some territories, the end of prioritization of liberal practice and the criminalization of human rights defenders, the capacity building and resources for public and civil servants, etc.— the new government should consider what can be done with less complexity in terms of business accountability. Is it possible to develop a NAP that accepts and explains the role of corporations in the conflict and post-conflict period? Can that NAP directly propose the creation of a space of dialogue with civil society? Can it remove some barriers to justice for victims in respect to, at least, the non-judicial remedy mechanisms? Can it become a starting point for a future and comprehensive law? The answers and the willingness of the new government to overcome the impunity of business in its country remains to be seen.

V. Concluding remarks

Conflict and post-conflict situations present significant regulatory challenges for the state, including in respect to business accountability for its environmental destruction and human rights abuses. This paper has focused on the post-conflict state of Colombia and its responsibility to protect human rights within the context of business activities through regulations and policies and the role of victims and civil society in face of the state's absence.

In that sense, the study has started with an exposition of the heightened due diligence international framework and briefly concluded that challenges remain in ensuring comprehensive guidance for states and justice for victims. The voluntary nature of the existing UNGPs principles and their inadequate recognition of power imbalances raise doubts about their ability to ensure responsible corporate behaviour in high-risk zones.

Then, the analysis focused on the state of Colombia's adherence to its responsibilities under the UNGPs and specifically their National Action Plan for Business and Human Rights (NAPs) of 2015 and 2020 to integrate the international principles into its national framework. Although the NAPs try to ensure horizontal coherence, in general face criticism for their

68 See e.g., Seagrave (n 37); InSight Crime. Centro de Investigación de crimen organizado, «Élites y crimen organizado en Colombia», IDRC, 2016, available at <https://insightcrime.org/wp-content/uploads/2023/08/Elites_Crimen_Organizado_Colombia.pdf> last accessed 13 November 2023.

state-centric approach, absence of vertical coherence and limited time frame. In addition, the Colombian plans lacked a comprehensive analysis of the role of corporations in the conflict and post-conflict period, emphasized the economic reactivation without a clear prioritization of human rights and the protection of the environment, and raised concerns, especially among civil organizations, about lack of real and effective measures and participation of civil society. These criticisms together with the limited initiative to investigate violations hinders Colombia's fulfilment of its role as a guarantor of human rights.

In face of these absences, the paper then has turned to the role of victims and civil society in search for businesses accountability for its human rights and environmental abuses. Arguing that victims in Colombia are not usually passive receivers of rights, but active actors, the study finds that victims and civil society, through their organisation, has taken on responsibilities attributed to the state such as investigating and denouncing human rights violations by corporations. Moreover, they also advance human rights protection when accessing non-judicial and judicial mechanisms with a vindicative discourse of human rights included in their legal arguments. One example of this dynamic between judges and civil mobilizations is the Constitutional Court's decision SU-123 of 2018. Nevertheless, several challenges remain in implementing court decisions, the fact that exceptional judicial mechanism does not reflect the difficulties of ordinary justice and the barriers that victims encounter when trying to access justice. Furthermore, scepticism surrounds the UNGPs and the due diligence framework among victims and Colombian organisations, which they do not usually resort to the principles or the concept to support their claims and demands.

The criticisms towards the international framework as well as the civil society opposition to the NAPs, contributes to the debate about the format, limits, premises, approach, and content of international principles to inform state's policies and business behaviour effectively and comprehensively in conflict-affected areas. Finally, it also raises questions regarding what can be done by the relatively new government of Gustavo Petro in advancing business accountability in its country. The challenges identified in the NAPs can overcome acknowledging the role of corporations, including precise measures and a civil society forum as well as facilitating access to justice. This, in turn, could pave the way for comprehensive laws in the country. However, the willingness of the state to ensure business accountability concerns the realms of politics, and its future trajectory remains uncertain.